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[CITED AM. NEG. CAS.]

**A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED
STATES CIRCUIT COURTS OF APPEALS, ALL THE UNITED
STATES CIRCUIT AND DISTRICT COURTS, AND THE
COURTS OF LAST RESORT OF ALL THE STATES
AND TERRITORIES, FROM THE EARLIEST
TIMES, WITH SELECTIONS FROM
THE INTERMEDIATE COURTS.**

**TOPICALLY ARRANGED
WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS**

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T. F. HAMILTON
OF THE NEW YORK BAR**

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AMERICAN NEGLIGENCE CASES.

CARRIER OF PERSONS.

BAY SHORE RAILROAD CO. v. HARRIS (BY NEXT FRIEND). (1)

Supreme Court, Alabama, December, 1880.

[Reported in 67 Ala. 6.]

ALIGHTING FROM CAR—INFANT UNDER SIX YEARS OF AGE NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.—An infant under the age of six years is not of sufficient discretion to be guilty of contributory negligence, and if he gets on a car at the invitation of the driver, and jumps off at his command, the railroad company will be liable for the injuries the child may sustain.

WHAT DAMAGES MAY BE RECOVERED.—In an action for personal injuries, the plaintiff may not only recover for the actual injury and suffering he has sustained and undergone at the time of the trial, but he is entitled to recover for the disabling effects of the injury, prospective as well as past.

CHARGE TO JURY.—It is not error to refuse a charge which may mislead or require explanation.

APPEAL from Mobile Circuit Court.

Action brought by William Harris, by Drs. Sherrard and Heustis as next friends, against the Bay Shore Railroad Company, to recover damages for a personal injury caused by the alleged negligence of the defendants. The complaint, which contained only one count, averred in substance, that defendants

1. Cited in Ala. G. S. R.R. v. Hill, 93 Ala. 518; Ala. M. R. Co. v. Martin, 100 Ala. 513.

owned and operated a "horse railroad in the city of Mobile; that on March 12, 1876, while one of the cars on defendants' said road was being driven along slowly, the driver called plaintiff, who was standing on the sidewalk, to get on the car, which plaintiff did, as requested; that he remained on the car until it returned to or near the place where he got on, and then and there, while said car was running at a rapid rate of speed, said driver ordered plaintiff to jump off said car, which he did as ordered, and plaintiff fell, and then and there the wheels of said car ran over and crushed one of plaintiff's legs, which was thereby fractured and broken, and plaintiff was otherwise greatly injured and wounded, so much that plaintiff had to have said leg cut off to save his life; that plaintiff was sick, sore and diseased for a long space of time, during all of which time he suffered great bodily pain, and became and is disabled for life. And plaintiff avers, that during the time aforesaid, he became largely indebted to Drs. Sherrard and Heustis for care and medical attention." Defendants demurred to the complaint, on the ground that the action was based on the willful act of defendants' servant, and they were, therefore, not liable, as alleged in the complaint. This demurrer was sustained, and plaintiff amended his complaint by inserting after the words "the plaintiff, an infant," the words "under six years of age," and by inserting before the words "ordered the plaintiff to jump off," etc., the words, "recklessly and carelessly." Defendants demurred to the amended complaint on the ground that the original complaint "was in form of an action of force," and the amendment was "in form of negligence," thus changing the nature of the action, but the court overruled this demurrer, and defendant excepted.

Plaintiff was a child under six years of age, and his evidence showed that on Sunday evening, March 12, 1876, his mother had gone to church and left him in charge of his brother, who was about fourteen years old. These two boys, and several others, were standing on the sidewalk near their father's house when a car of the defendants came slowly along the road going towards a turntable which was at the end of the track, some two hundred yards off, and the driver stopped the car and called the boys to come to it; that the driver asked them to lend him a knife, and told them to get on the car. While in the act of getting on the

car, plaintiff's father called to them not to get on the car. They did so, however, without having heard him, and the driver used the plaintiff's knife in cutting some straps for his whip. No one else was on the car except the plaintiff and his brother. They went to the turntable, and on their return near the place where they got on, and while the horses, which were drawing the car, were in a "fast trot," the driver ordered the plaintiff to jump off. Plaintiff was at that time on the front platform of the car with the driver, his brother being inside of the car. In attempting to jump off the car, plaintiff fell, and the car wheel passed over and broke his leg, which was amputated because the physicians thought it necessary to do so to save his life.

The driver testified that plaintiff would sometimes jump on the car without his consent and against his objection and jump off again, and if plaintiff and his brother were on the car at the time the accident occurred, he did not know it.

The court, among other things, charged the jury that "if you find that the plaintiff was injured by the negligence of the defendants' car driver, and you believe the plaintiff was under six years of age at the time, then contributory negligence can not be set up to defeat his right to recover; and "that the damages are not to be restricted to any special pecuniary loss, but would include present and prospective damages, considering plaintiff's age when injured, his circumstances and position in life, the expenses incurred in nursing and caring for him, and medical attention." Defendants excepted to these charges, and requested several charges, among them, 2. "That defendants, as owners of the railroad company, were not liable for the injury if it was caused willfully by the acts of their agents or servants." 3. "The plaintiff cannot recover on this complaint on the facts as they are adduced by the plaintiff." 7. "That if the injury was occasioned by the carelessness and negligence of the defendants' servants, in the proper discharge of the servants' duty, then the plaintiff can recover only the actual damages shown by the evidence before the jury to have been incurred." The court refused to give these charges, and defendant excepted. There was a verdict and judgment for the plaintiff for \$3,000. The action of the court in overruling the demurrer and refusing the charges is the error assigned.

ALEX. MCKINSTRY, for appellant.

WM. BOYKES, for appellee, cited: *Gov't St. R.R. v. Hanlon*, 53 Ala. 70; *Hilton v. Middlesex R.R.*, 107 Mass. 108; *Lovett v. South Danvers R.R. Co.*, 9 Allen, 557.

Stone, J.—When injury is the direct and primary, or inevitable result of gross or reckless carelessness, an action of trespass will lie. But, when the injury, though proximate, is secondary or consequential—not the necessary result of the act of negligence—then, a special action on the case is the remedy. *Sheppard v. Furniss*, 19 Ala. 760; *Rhodes v. Roberts*, 1 Stew. (Ala.) 145. The injury charged in the present complaint—in the original as well as the amended count—is secondary and consequential; not the direct, primary, immediate effect of the wrongful or reckless act imputed to the driver. The direct, primary effect was the leap from the car. The consequence was, that the child, by reason of its tender years, being unable to clear the track, was run over and its limb crushed by the wheels. If the driver had thrust or thrown the child on the track, and he was thus run over, all this would have been the direct result of the force employed, and trespass would have been the appropriate remedy.

The plaintiff in this case being under six years of age, was not of sufficient discretion to be guilty of contributory negligence—*Gov't Street R.R. Co. v. Hanlon*, 53 Ala. 70. The pleadings make a clear case for recovery. *Phila. & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Lovett v. R. R. Co.*, 9 Allen, 557; *Wilton v. R.R. Co.*, 107 Mass. 108; s. c., 9 Am. Rep. 11.

Charge numbered 7, asked by defendant, probably asserts a correct legal principle. We think, however, that an average jury would be misled by it into the erroneous conclusion that plaintiff could recover only for the actual injury and suffering he had sustained and undergone at the time of the trial. That is not the rule. He was entitled to recover for the disabling effects of the injury, prospective as well as past. *S. & N. R.R. Co. v. McLendin*, 63 Ala. 266. It is not error to refuse a charge which may mislead, or requires explanation. *Bynum v. So. Pipe & Pump Co.*, 63 Ala. 462; *Duvall v. State*, *Ib.* 12; *Farrish v. State*, *Ib.* 164, and authorities there cited.

Affirmed.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA V. LETCHER. (1)

Supreme Court, Alabama, December, 1881.

[Reported in 69 Ala. 106.]

CONTRIBUTORY NEGLIGENCE TO JUMP FROM TRAIN LEAVING STATION.—The plaintiff boarded the defendants' train to assist a lady to find a seat and to hand a note to another lady who was on the train. While he was looking for the note among some papers in his hands the train began to move, its speed increasing each instant, and to prevent his being carried off he walked to the front platform and thence to the rear platform of the next car, down the steps and off the car at right angles thereto, still having in his hands the letters that he was looking at in the car. As his foot touched the ground he fell and his arm was caught in some portion of the car and crushed, and had to be amputated. None of the employees of the train knew of his presence, nor did he attempt to arrest the progress of the train or ask them to. *Held*, that in an action for the injuries the court should have instructed the jury that the plaintiff had no right to recovery, even though it appeared that the defendants were negligent in not giving the signals required by statute before the train left the station.

FAILURE OF RAILROAD COMPANY TO GIVE SIGNALS REQUIRED BY STATUTE DOES NOT RELIEVE ONE FROM THE DUTY OF TAKING ORDINARY CARE TO AVOID INJURY.—The failure of the employees of a railroad company to sound the whistle or to ring the bell as required by statute immediately before and at the time of leaving the depot is negligence; but the statute does not relieve those who may be in peril of injury from the neglect of the servants of the company from the duty and necessity of taking ordinary care to avoid the injury; nor does it modify or abrogate the principle that a plaintiff shall not recover for injuries not wanton, to which his own negligence directly contributes.

APPEAL from Lee Circuit Court.

Action by James F. Letcher, the appellee, against the Central Railroad and Banking Company of Georgia and the Georgia Railroad and Banking Company, corporations owning and operating a

1. Cited in *Ala. G. S. R.R. Co. v. Hawk*, 72 Ala. 112, 2 Am. Neg. Cas. 10; *South & North Ala. R.R. Co. v. Schaufier*, 75 Ala. 136, 2 Am. Neg. Cas. 18; *Rickets v. Birmingham St. Ry. Co.*, 85 Ala. 601, 2 Am. Neg. Cas. 24; *Central R.R. etc. Co. v. Miles*, 88 Ala. 256, 2 Am. Neg. Cas. 29; *Louisville, etc. R. Co. v. Lee*, 97 Ala. 325, 2 Am. Neg. Cas. 91.

railroad in the State of Alabama, the appellants, for the purpose of recovering damages for personal injuries sustained by the appellee in jumping from the train of the appellants while it was in motion. The companies pleaded not guilty. The plaintiff, in the lower court, was examined as a witness in his own behalf, and his testimony was, in substance, as follows: "On the evening of March 7, 1879, he went on board of one of the passenger trains of the defendants, at its regular depot in the town of Auburn, for the purpose of handing a note to a young lady who was expected to pass through on the train on her way to Montgomery, at the same time, at the request of an acquaintance, escorting on the train another lady who intended becoming a passenger thereon. There was no conductor in the ladies' car when he entered, and he had some trouble and experienced some delay in finding a seat for the lady whom he had escorted on board of the train, but finally succeeded in obtaining one near the door. By the time the lady had taken her seat the train started, and plaintiff, turning to the lady for whom he had the note, and who was seated immediately across the aisle from the one for whom he had obtained the seat, told her that he had a note for her, but that he did not have the time to give it to her, he at the same time continuing to move towards the door of the car, and taking out some letters from the breastpocket of his coat. Without stopping he went out of the door, and finding a man on the platform of the car out of which he had come and in the way of his getting off therefrom, he stepped forward on the rear platform of the next car and thence down the steps and directly off the car at right angles thereto, still having in his right hand the letters which he had taken from his coat pocket while he was in the car. He did not remember whether he took hold of the railing with his left hand or not. At the time he stepped off the car, the train was running at the rate of five or six miles an hour. As his foot touched the ground he was tripped by the two motions and fell to the ground, and as he fell his left arm was caught under the wheel or some portion of the car, and was so crushed and mutilated that it had to be amputated. He did not hear the bell ring or the whistle blow immediately before or at the time the train started."

Several other witnesses were examined, the evidence being conflicting as to the length of time the train stopped at the depot

(some testifying that it did not stop a minute, others that it stopped two or three minutes), and as to whether the bell rang or the whistle blew immediately before and at the time of starting, and on other points. In addition to numerous other charges, the defendants asked the court in writing to charge the jury, that if they believed the evidence they must find for the defendants, which the court refused to give, and the defendants excepted. The jury returned a verdict for the plaintiff, and a judgment was rendered thereon in his favor. The ruling of the Circuit Court is one of the errors assigned.

GEO. P. HARRISON, for appellants.

J. M. CHILTON, W. H. BARNES and W. J. SAMFORD, for appellee.

Brickell, Ch. J.—In *M. & C. R.R. v. Copeland*, 61 Ala. 376, the undisputed facts were, that plaintiff's intestate attempted to cross defendants' railroad track, by passing under the coupling of two box cars, which were coupled together and constituted part of a freight train, then standing temporarily on the side track, placed there with locomotive and steam up, to allow a passenger train to pass it. While in the act of passing under the coupling, the train was moved, and he was knocked down, run over and killed. There was conflict in the proof as to whether the required signals were, or were not given; but upon the assumption that the signals required by statute were not given, and upon a consideration alone of the undisputed facts, we held, that the attempt thus to pass between the cars of a train, which he must have known was liable to be moved, could not be classed as less than negligence bordering on recklessness. "It certainly contributed," we said, "proximately contributed to the very sad disaster which followed. If the usual signals had been sounded, probably the intestate could have extricated himself in time to save his life. If he had not attempted to cross over between the cars, he would have been in no peril, and suffered no injury. Both were in fault." Our decision in that case was, that there could be no recovery against the railroad company, although there was on its part negligence in failing to give the signals required by statute, immediately before and at the time of the moving or departure of the train, the injury not having been inflicted wantonly or intentionally.

Applying the same principles to the facts of this case, as shown by the evidence of the plaintiff, and deducing therefrom every inference advantageous to him which may be fairly and properly deduced; excluding all evidence favorable to the defendants, the injury of which he complains is attributable directly and immediately, not to the negligence imputed to the defendants, but to his own thoughtless and reckless act. The risk he assumed, and assumed only to avoid a slight temporary inconvenience, in view of the circumstances, was more hazardous than that Copeland assumed. When he endeavored to pass under the train, it was motionless, and there was no indication that it would be moved before he would have passed beyond it. The train here was moving from a regular depot, on its accustomed journey, the speed increasing every moment; all who were in charge of it were ignorant that the plaintiff was upon it; and without an effort to arrest its progress, of his own accord, his right hand filled with papers taken from his pocket, he walks from one platform to another, and descends in a manner that was almost certain to cause him to fall. To permit him to recover of the defendants for the injuries sustained by the fall, would be simply compelling them to compensate him for his own wrongful and reckless act. Under these circumstances, the court should have instructed the jury, on the request of the defendants, that the plaintiff had no right of recovery. There was really no question to submit to the determination of the jury, without seeming to invite them, under the influence of sympathy for the sufferings of the plaintiff, or upon conjecture and speculation, to render a verdict it would have been the duty of the court to set aside. *M. & C. R.R. Co. v. Copeland, supra; R.R. Co. v. Houston*, 95 U. S. 697

As was said by Black, Ch. J., in *R.R. Co. v. Aspell*, 23 Penn. St. 147, "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." The negligence of the employees of the defendants, the failure to sound the whistle or to ring the bell, as required by the statute, immediately before and at the time of leaving the depot, involved

the defendants in liability for all injuries to person or property resulting from the failure. Of itself, and in itself, it was negligence. *M. & C. R.R. Co. v. Copeland*, *supra*; 2 *Thomp. Neg.* 232, § 8. The statute does not relieve whoever may be in peril of injury from the neglect of the servants and employees of the railroad company to observe its requirements, from the duty and necessity of taking ordinary care to avoid the injury; nor does it modify or abrogate the principle that a plaintiff shall not recover for unintentional injuries—for injuries not wanton—to which his own negligence directly and immediately contributes. *R.R. Co. v. Houston*, *supra*.

The only injury which could have resulted to the plaintiff from the neglect to give the signals for the departure of the train was the inconvenience of being carried from his home, the loss of time, and the labor or expense of returning. These were the immediate, direct consequences of the neglect. To avoid them he was not justified in putting in jeopardy life or limb; and if he should, and other injury result, the compensation he can rightfully demand is not increased. What would have been his rights, if there had been the presence or pressure of impending peril of personal injury, and to avoid it he had leaped from the train; or, what would have been his rights, if, under the advice, direction, or command of an agent or employee of the defendants, he had left the train as he did, are not questions now for consideration. In the absence of such peril, or of such advice, direction, or command, or of some other circumstance lessening the carelessness of the act, or giving to it the color of necessity, leaping from a moving train by all the authorities is esteemed negligence, debarring a recovery because of the prior negligence of the servants or agents of a railroad company. The question is fully considered and discussed in authorities to which we refer. *Lucas v. N. B. & T. R.R. Co.*, 6 *Gray*, 64; *Morrison v. E. R. Co.*, 56 *N. Y.* 302; *Burrows v. E. R. Co.*, 63 *N. Y.* 556; *R.R. Co. v. Aspell*, 23 *Penn. St.* 147; *Damont v. N. O. & C. R.R. Co.*, 9 *La. Am.* 441; *J. R.R. Co. v. Hendricks*, 26 *Ind.* 228; *Dougherty v. C. B. & Q. R.R. Co.*, 86 *Ill.* 467; *Lambeth v. N. C. R.R. Co.*, 66 *N. C.* 494; *Doss v. M. K. & T. R. Co.*, 59 *Mo.* 27; *Nelson v. A. & P. R.R. Co.*, 68 *Mo.* 593; *L. S. & M. S. R.R. Co. v. Bangs*, 47 *Mich.* 470.

The Circuit Court erred in several of its rulings, and especially in refusing, on request, to charge the jury on the evidence to a verdict for the defendants.

Reversed and remanded.

ALABAMA GREAT SOUTHERN RAILROAD v. HAWK. (1)

Supreme Court, Alabama, December Term, 1882.

[Reported in 72 Ala. 112.]

INJURED WHILE STANDING ON PLATFORM PREVIOUS TO ALIGHTING.—A passenger who is injured while standing on the platform of a car in violation of a regulation forbidding passengers upon such platform while the train is in motion, is guilty of contributory negligence and cannot maintain an action to recover damages for personal injuries. Such a regulation is reasonable and proper.

STATUTORY PROVISION AS TO BLOWING WHISTLE.—The provisions of the statute (Code, §§ 1699, 1700) which require the engineer or person in charge of a moving train of cars to blow the whistle and ring the bell on approaching a depot or stopping place, are intended for the protection and benefit of the traveling public not on the train. Ordinarily a passenger on the train is not included in the letter of the statute and cannot complain of its violation in an action for damages for personal injuries to which the failure to ring the whistle or bell has had no tendency to contribute. Cases may possibly occur in which passengers or other persons permissively on a train are entitled to such signals given as a warning to hasten their departure from the train.

APPEAL from the Circuit Court of DeKalb.

Action by James M. Hawk against the appellant, Alabama Great Southern Railroad Corporation, to recover damages for personal injuries sustained by him in being thrown, or falling, from the platform of a passenger car at Valley Head, to which station he had traveled as a passenger from Fort Payne, another station on defendant's road, on November 10, 1879. Defendant pleaded, 1, not guilty; 2,

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| 1. Cited in South & North, etc. | McCauley v. Tenn. etc. |
| R.R. v. Schaufler, 75 Ala. 136, 2 | Ala. 358; Terry v. Birmi |
| Am. Neg. Cas. 18; Central R.R. | Bk., 93 Ala. 609; L. & N. |
| etc. Co. v. Miles, 88 Ala. 256, 2 | v. Pearson, 97 Ala. 21 |
| Am. Neg. Cas. 29; Richmond, etc. | Engel, 101 Ala. 512. |
| R. Co. v. Hammond, 93 Ala. 185; | |

injuries to plaintiff now complained of, if any he received, would not have occurred without his fault or negligence, and that his fault and negligence contributed, proximately and directly, to produce said injuries, and said injuries were not the result of any wanton, reckless, or intentional act done by this defendant, its agents or servants;" 3, the statute of limitations of one year. Issue was joined on all these pleas.

The original summons was sued out on October 25, 1880; but service was set aside by the court at the next ensuing term, and leave given to the plaintiff to issue an alias; and another writ was issued on June 25, 1881, which was in form an original, and not an alias. On the trial, as the bill of exceptions recites, the defendant offered this last writ in evidence, as showing the commencement of the action, and objected to the admission of the former writ, when offered in evidence by the plaintiff, "on the ground that the same was illegal, irrelevant, and inadmissible under the issues joined." This objection was overruled, and the former writ was allowed to go to the jury as evidence; and the plaintiff was permitted to prove that the service of that writ had been set aside by the court, as stated, and leave granted to issue an alias. On this evidence "the court charged the jury, of its own motion, that the summons and complaint dated the 25th June, 1881, was not on its face an alias summons and complaint, but that the jury could look at the summons and complaint dated the 25th October, 1880, to see whether that of the 25th June was an alias; and if the jury found that this last writ was an alias, then the plea of the statute of limitations was avoided." To this charge, and also to the admission of the evidence objected to, exceptions were reserved by the defendant.

Plaintiff testified as a witness for himself, stating the circumstances under which he was injured, and he introduced two witnesses who were present at the time the accident occurred. The engineer and the conductor of the train were examined as witnesses for the defendant. The material facts are stated in the opinion. Defendant requested the following charges, which were in writing: 1. "Negligence consists either in doing what a man of ordinary intelligence, care and prudence ought not to do, and would not do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done, and would have

done; and if the plaintiff was guilty of either of these kinds of negligence, and thereby contributed, proximately and directly to produce the injuries of which he complains in this suit, then the jury ought to find a verdict for the defendant, although they may believe that it was possible for the engineer to have stopped the train precisely at the depot, and that the engineer honestly and in good faith tried to do so, but failed on account of the wet weather.

2. "If the plaintiff, by ordinary care, and by ordinary observance of the known rules and regulations of the defendant corporation, could and would have avoided the injuries of which he here complains; and if, by his failure to exercise such ordinary care, he contributed proximately and directly to produce the injuries of which he here complains; then, upon this state of facts, the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor or engineer." The court refused each of these charges against the defendant excepted to their refusal. The refusal of the charges, and all the other rulings of the court to which exceptions were reserved, are assigned as error.

RICE & DOBBS, for appellant.

DUNLAP & DORTCH, for appellee.

Somerville, J.—The action here is for an injury to the person of the plaintiff, which resulted from his being accidentally struck or having fallen from the platform of a passenger car of the defendant railroad company. The plaintiff charges the injury to be the result of the negligence of the defendant's servants, and the defense proposed is the negligence of the plaintiff himself, which is alleged to have proximately contributed to the injury.

It was justly observed by this court, in *M. & C. R.R. Co. v. Land*, 61 Ala. 376, that the doctrine of contributory negligence is firmly rooted in our jurisprudence to be open to further development. "Its underlying principle is, that no man should, or be permitted to recover for a tort or wrong to which his own want of care has directly or proximately contributed. That is, that if, by his failure to exercise ordinary care, he might have avoided the consequences of the defendant's negligence, the plaintiff is regarded as the author of his own wrong. It is commonly observed, that to allow the plaintiff to recover in such a case would be to give him damages for the proximate consequence of his own negligence."

his own negligence. *Tanner v. L. & N. R.R. Co.*, 60 Ala. 621; *M. & C. R.R. Co. v. Copeland*, *supra*; *Shear. & Redf. on Neg.* § 24; *Wood's Mayne on Dam.* 96; *Wharton on Neg.* §§ 300, 301; *Gothard v. Ala. Gr. S. R.R. Co.*, 67 Ala. 114.

There are certain qualifications of this rule, which are fully discussed in the case of *Tanner v. L. & N. R.R. Co.*, *supra*, and were allowed by this court in subsequent rulings; *Cook v. Central R.R. and Banking Co.*, 67 Ala. 533; *Gothard v. Ala. Gr. S. R.R. Co.*, *supra*. There is no evidence in this record tending to show that the injury suffered by the plaintiff was brought by any act of the defendant which was wanton, reckless, or intentional. If such had been the case, the defendant would have been liable, notwithstanding the plaintiff's want of ordinary care. Nor is there any evidence tending to prove that the peril of the plaintiff was manifested to the servants of the defendant company in time to have averted the catastrophe by the exercise of preventive effort on their part. The injury occurred simultaneous with, or prior to the discovery of the plaintiff's danger. Hence, the modifications of the general doctrine of contributory negligence, as recognized in the cases last above cited, have no room for application to the case at bar. *Price v. St. Louis R.R. Co.*, 3 Amer. and Eng. R'y Cas. 365; *Little Rock, etc. R.R. Co. v. Parkhurst*, 5 Ib. 635.

The facts of the present case seem clear and undisputed. The plaintiff was a passenger on the regular passenger train of the defendant company, and had paid his fare to Valley Head, an established station on the line of the Alabama Great Southern Railroad. There was a down grade in approaching this depot, and the track was wet from rain; in consequence of which the cars composing the train were carried by the engine twenty-five or thirty yards beyond the customary stopping place. The conductor signaled the engineer to back the train to the depot, which he did, as is shown to have been usual on such occasions. The whistle had been sounded about half a mile before approaching the station; but this was not continued, nor does it appear that the bell was rung while thus approaching. It is shown to have been towards night, on the 10th day of December, 1879, and was "*dark, raining, and cloudy.*" When the engineer sounded the whistle, as a signal of approach to Valley Head station, or very soon after, the plaintiff, according to his own testimony, "*went out of the*

passenger car, on to its platform, and remained there until the train at a reduced rate of speed, passed the depot," when he was precipitated, or fell from the platform, so as to render him temporarily unconscious. How the accident happened the plaintiff was able to state. The regulations of the railroad company forbade passengers to stand on the platform while the trains are in motion. The rate of speed at which the train was moving, when it passed the depot, was from three to five miles an hour.

It is manifest that the plaintiff would not have been injured but for his own co-operating negligence. Standing upon the platform while the train was in motion, in the dark, was a want of ordinary prudence, which contributed directly to the injury suffered. The regulation of the company forbidding this was a reasonable one, and its violation by the plaintiff was a want of ordinary care on his part, under the circumstances. If passengers traveling on railroad trains insist upon thus exposing themselves unnecessarily to danger, they must do so at their own peril, not at the peril of the railroad companies. *Hickey v. B. & O. R.R. Co.*, 14 Allen, 429; *Quinn v. Illinois, etc. R.R. Co.*, 111 Ill. 495; *R.R. Co. v. Jones*, 95 U. S. 439.

The court erred in refusing to give the charges number one and two, requested by the defendant, which were but clear applications of the above enunciated principles.

2. Whether the engineer was *ringing a bell*, on approaching the depot, was not material. The statute, it is true, provides that a bell shall be rung, or a whistle blown, as a signal to be given, or else for the whistle to be blown, at any place until the train reaches the depot, or stopping place, before entering any curve crossed by a public road, or where the engineer cannot see at least one-fourth of a mile ahead, and upon entering into the corporate limits of any town or city. Code, 1876, § 1697. And a railroad company is liable for all damages done to person, stock, or other property *resulting* from a failure to comply with these requirements. Code, § 1700. These precautions, so far as applicable to passengers, are intended obviously for the benefit of the traveling public, and others who have a right to be warned of approaching trains for their personal protection against injury. Passengers, when on the trains, are not ordinarily included in the letter or spirit of the statute. They do not need such signals of warning.

protection, and they cannot, therefore, be construed to be entitled to them. *S. and N. Ala. R.R. Co. v. Thompson*, 62 Ala. 494; *R.R. Co. v. Bowdron*, 92 Penn. St. 475, 37 Am. Rep. 707. The failure to ring a bell, at the time of the injury to the plaintiff, could have no tendency to contribute to such injury. We can see no legal connection between this negligence of the defendant and the alleged damage suffered by the plaintiff. The court erred, therefore, in permitting the plaintiff to testify that no bell was rung by the engineer as the train was approaching the depot at Valley Head, at the time of the alleged injury. It may be proper to add, that cases may possibly occur where passengers, or other persons permissively on a train, are entitled to have such signals given, as a warning to hasten their departure from a train immediately before leaving a depot or stopping place, as the statute requires to be done. Code, § 1699; *Doss v. M. K. & T. R.R. Co.*, 59 Mo. 27; 21 Am. Rep. 371; *Letcher v. Ga. Cent. R.R. & Bank Co.*, last term.

3-4. The present action, being a claim for damages on account of a personal injury, is governed by the statute of limitations of one year. *M. & M. R'y Co. v. Grenshaw*, 65 Ala. 566. The date of the summons, however, was not conclusive evidence of the time of the commencement of the action. Nor was the form of the summons conclusive of its character as an *original* or an *alias*. Even if in form an original, such process "may be amended, on proper evidence, so as to show it is in fact an *alias*." *Huss v. Central R.R. & Banking Co.*, 66 Ala. 472; *Steamboat Farmer v. McCraw*, 31 Ala. 659. The court erred in referring this question to the jury. It was a matter of law for its own determination. *Jones v. Pullen*, 66 Ala. 306; *Taylor v. Kelly*, 31 Ala. 59; *Price v. Mazange*, *Ib.* 701.

5-7. The objection interposed to the testimony of the witness, Allison, should have been sustained. This witness was permitted to testify to the jury, that, "*a few minutes* after the plaintiff had been hurt, the conductor asked the engineer, *why he did not respond to the bell-call*; and the engineer answered, that he *did respond to all the bell-call he heard*." To the admission of this evidence the defendant duly excepted.

The rule is well established, that it is not within the scope of an agent's authority to bind his principal by admissions having

reference to bygone transactions. The only ground for the admissibility of an agent's declarations is that they must have been made while in the discharge of duties as agent, and be so closely connected with the action in issue as to constitute a part of the *res gestæ*. *Mont. R.R. Co. v. Ashcraft*, 48 Ala. 15; *Tann v. N. R.R. Co.*, 60 Ala. 621; *Robinson v. Fitch Co.*, 7 Gray, 92; *Baldwin v. Ashley*, 54 Ala. 8 p. 63, §§ 160-162.

It is difficult, if not impossible, to accurately define *res gestæ*, as it is often called. It is common to make reference to such circumstances and declarations *poraneous* with the main fact under consideration, connected with it as to illustrate its character. § 108. What lapse of time is embraced in the word "contemporaneous," is often a question of difficulty. Perfect contemporaneity between the declaration and the main fact is not required. It is enough that the two are substantially contemporaneous; they need not be literally so. The declaration must, however, be so proximate in point of time as to grow out of and explain the character and quality of the main fact, and be so closely connected with it as to virtually constitute a part of the entire transaction, and to receive support and corroboration from the principal act sought to be thus elucidated and explained. Evidence offered must not have the earmarks of a declaration made at a distance of time, nor be merely narrative of a transaction wholly and substantially past. *Thomp. on Carr. of Pass. v. Gandy v. Humphries*, 35 Ala. 617; *Henderson v. State*, 23; *Enos v. Tuttle*, 3 Conn. 250; *Scraggs v. State*, 722; *Com. v. Hackett*, 2 Allen, 136; *Luby v. Hudson*, 17 N. Y. 131; *Ewell's (Evans) Agency*, 219-220; *Hannibal, etc. R.R. Co.*, 73 Mo. 516; s. c. 39, Am.

In *Thompson v. Trevanion*, *Skinner*, 402 (1), it was held that what the wife said immediately upon the hurt received

1. In *Thompson v. Trevanion*, *Held*, that what the wife said immediately upon the hurt received before she had time to deliberate anything for her defense might be given in evidence.

she had time to devise or contrive anything for her own advantage," might be given in evidence under this principle. In *Luby v. Hudson River R.R. Co.*, *supra*, the declarations of the driver of a street car, made after an accident had occurred and the car had been stopped, but before he had left it, to the effect that he could not stop the car because the brakes were out of order, were ruled to be mere hearsay and inadmissible.

In *Adams v. Hannibal, etc. R.R. Co.*, 74 Mo. 533; s. c., 41 Am. Rep. 333, the court, for a like reason, excluded the declarations of the engineer and fireman of the train, made immediately after the deceased was struck and the train was stopped, showing that the accident was occasioned by the negligence of the engineer. The case is clearly analogous to the present one, and the views of the court, after a clear and instructive review of the cases, fully accord with the conclusion reached by us, and the reason upon which that conclusion is based. Our conclusion is, that the declarations of the conductor and engineer cannot, under a proper application of this principle, be regarded as a part of the *res gestæ* of the accident resulting in the injury to plaintiff. The time—"a few minutes"—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete. *Thomp. on Carr. of Pass.* pp. 557-8; *Packet Co. v. Clough*, 20 Wall. 528, 540; *Morse v. C. R.R. Co.*, 6 Gray, 450; *Michigan, etc. R. Co. v. Carrow*, 73 Ill. 348; 1 *Brick. Dig.* 843; §§ 553-555; *Gandy v. Humphries*, 35 Ala. 617.

The judgment of the Circuit Court is reversed, and the cause remanded.

SOUTH & NORTH ALABAMA RAIL SCHAUFLE. (1)

Supreme Court, Alabama, December Term

[Reported in 75 Ala. 136.]

CONTRIBUTORY NEGLIGENCE IN ALIGHTING

CAR.—A passenger who, encumbered with articles steps from a railroad train in the darkness of night, w the rate of six or eight miles per hour, and before re: of a regular station at which he intended to get off, which it is shown he was acquainted, against the advice and with no reason to believe that the train would not : platform, is guilty of contributory negligence and cann for personal injuries received in stepping from the tra

ALIGHTING FROM CAR BY DIRECTION OF CONDUCTOR

a passenger leaving a moving train by or under the : of the conductor receives personal injuries, it seems to authorities, that such advice, even though plain and una be held to excuse an act of negligence on the part of a which would be so opposed to common prudence as to act of recklessness or folly.

WHEN PLAINTIFF'S NEGLIGENCE MAY BE EXCUSED

case, if the act advised to be done is one where the d be apparent to a person of reasonable prudence, and t under the influence of such advice, given by the cond in the line of his ordinary duties, it becomes the provin say how far the plaintiff's negligence may be excused.

APPEAL from Cullman Circuit Court.

Action by Charles Schaufler against the South & North Alabama R.R. Company, a domestic corporation, to recover for personal injuries sustained by him while a passenger on defendant's train. The judgment entry recites that the case was tried on issues joined on the plea of not guilty and the plea of contributory negligence." The trial resulted in a verdict and judgment for plaintiff; and from the judgment the defendant appealed. The facts are sufficiently stated in

1. Cited in *Highland Ave. etc. R. Co. v. Winn*, 93 Ala. 306, 2 Am. Neg. Cas. 78; *L. & N. R. Co. v. Lee*, 97 Ala. 325, 2 Am. Neg. Cas. 91; *East Tenn. etc. R. Co. v. Birm. Min. R. Co.*, Ala. 332, 2 Am. Neg. Cas. 160.

The first and fifth charges referred to in the opinion as having been requested by the defendant and refused by the court, are as follows: 1. "If the jury believe the evidence, they will find for the defendant." 5. "The court charges the jury, that if they believe from the evidence, that the plaintiff, Schaufler, was not forced and compelled to get off defendant's train in any other manner than as testified to by himself, that he cannot recover in this action and they must find for the defendant." Defendant reserved exceptions to the refusal to give these charges, and also to several charges given at the plaintiff's request, and the rulings are among the errors assigned.

THOS. G. JONES and J. M. FAULKNER, for appellant, cited: *Smith v. Causey*, 28 Ala. 655; *Fernades v. S. R. Co.*, 52 Cal. 45; *Gonzalez v. N. Y. & H. R.R. Co.*, 38 N. Y. 442; *M. & C. R.R. Co. v. Copeland*, 61 Ala. 376; *Central R.R. & B. Co. v. Letcher*, 69 Ala. 106; *Gothard v. Ala. G. S. R.R. Co.*, 67 Ala. 119; *Gavett v. M. & L. R.R. Co.*, 16 Gray, 501; *R. & D. R.R. Co. v. Morris*, 31 Gratt. 200; *R.R. Co. v. Aspell*, 23 Pa. St. 147; *O. & M. R.R. Co. v. Schiebe*, 44 Ill. 461; *P., C. & St. L. R.R. Co. v. Krouse*, 30 Ohio St. 222; *C. B. & Q. R.R. Co. v. Hazzard*, 26 Ill. 385; *C. & A. R.R. Co. v. Randolph*, 53 Ill. 511; *Improvement Co. v. Munson*, 14 Wall. 442; *Whart. on Neg.* § 420; *Pierce on Rail.* 312, n. 1.

H. L. WATLINGTON, for appellee, cited: *Tanner v. L. & N. R.R. Co.*, 60 Ala. 637; *M. & O. R.R. Co. v. Malone*, 46 Ala. 392; *N. & D. R.R. Co. v. Comans*, 45 Ala. 437; *Grant v. Moseley*, 29 Ala. 302; *Hussey v. Peebles*, 53 Ala. 432; 1 Chit. on Plead. 129; *Phares v. Stewart*, 9 Port. 336; 45 Mo. 255; 48 Ill. 221; 49 Ill. 490; 38 Ill. 370; 43 Miss. 233; 24 Ga. 75; 27 Ga. 113; *Wharton's Neg.* §§ 3, 94, 95, 301, 307, 308, 376; *Gov. St. R.R. Co. v. Hanlon*, 53 Ala. 70; *Shear. & Redf. on Neg.* 481, 485, 487; 1 Hill. on Torts, §§ 137, 170; *S. & M. R.R. Co. v. Shearer*, 58 Ala. 672.

Somerville, J.—The present suit is one for damages, instituted by the appellee, who was a passenger on the defendant's railroad train, having paid his fare for transportation to Cullman, a station or depot on the line of the road within this State. The averment of the complaint is, that the plaintiff, without any fault of his own, "was *compelled* and *forced* by the agents of said defendant to get off defendant's train while in motion, and before

said train had reached the usual stopping place at said depot," and that the plaintiff's injury was produced by the negligence of defendant's agents "in *compelling* and *forcing* said plaintiff to get off defendant's train." It is obvious that the whole gravamen of the action is made to lie in the alleged forcible ejection of the plaintiff from the passenger car by the agents or servants of the defendant railroad company. Whether the complaint be regarded, in form, as declaring in trespass or trespass on the case, is immaterial. It is equally unimportant that the averment in question was unnecessary in order to have fixed the liability of the defendant. It was necessary to allege some act of wrong on the part of defendant, or its agents, some act of omission or commission, constituting a *tort*, or breach of legal duty, before a recovery could be had by the plaintiff. This was requisite in order that the defendant might have notice of the nature of the case which he was called on to defend. The plaintiff has elected to state his own ground of action, and if, in doing so, he has stated a particular fact, and, by his mode of statement, has inseparably connected it with the substance of the issue, so as to render proof of it essential, it is a misfortune of his own, which cannot be justly visited upon his adversary.

We fail to discover in the record any evidence tending to support this averment of the complaint. There is no fact stated which tends to prove that the plaintiff was compelled or forced in any manner by defendant's agents, or by anyone else, to leave the train. The only part of the evidence which is invoked in argument, as giving any color of support to this view of the case, is the statement, testified to by the plaintiff himself, that when the passenger train was approaching the platform at the station, the conductor came towards him in the car, where he was seated, crying out the name of the station and saying: "*We have got no time, hurry up!*" and that this ejaculation was repeated several times while the plaintiff was making his egress from the car and before he stepped from the moving train a few minutes afterwards, thus receiving his injury. It is not only proper, but it becomes necessary for us to say that these words, alleged to have been used by the conductor, are not susceptible of a construction which would impute to him any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself

in the slightest peril in leaving it. There was, for this reason, a material disagreement between the allegation of the complaint and the proof, which constituted a fatal variance. The substance of the issue, as made by the pleadings, is unsupported by any evidence found in the record. The court erred, therefore, in refusing to give the first and fifth charges requested by the defendant, which properly raise this feature of variance. The several charges also given at the request of the plaintiff, which seem to have been based upon the supposed existence of any force, compulsion, or terror exercised by the conductor upon the plaintiff, were clearly misleading, and should not have been given.

In view of the errors above stated, the judgment of the Circuit Court must be reversed, and the cause remanded. We proceed to state a few principles, pertinent to the rulings of the court as found in this record, which may serve to facilitate the promotion of justice, and for the guidance of the court and jury upon another trial.

It is plain that the first inquiry must be as to whether the agents of the defendant have been guilty of any tort, wrongful act or negligence, which has resulted in producing the injury received by the plaintiff. If there has been no wrongful act of omission or commission, such as constitutes a violation of legal duty on the part of the defendant, or its agents who were in charge of the train at the time of the accident, no recovery of damages by the plaintiff can be had, whatever may be the extent of his injury. So, if it be shown that the defendant, or its servants, were guilty of such wrongful act, but that this act had no legal connection with the injury received, so as to have operated to produce it as a natural and proximate consequence, there is no liability cast upon the defendant, and this must be an end of the case.

If, however, it is ascertained that the defendant or its servants have been guilty of some wrong or negligence, the question then is: 1. Whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant, or such servants; or, 2. Whether the plaintiff, by his own negligence, or want of ordinary care and prudence, has so far contributed to his own misfortune that, but for such contributory negligence on his part, the misfortune or injury complained of as the basis of his

action would not have happened. *Ala. Gr. S. R.R. Co. v. Hawk*, 72 Ala. 112, and cases cited; *R.R. Co. v. Jones*, 95 U. S. 439. In the first contingency the plaintiff may be entitled to recover, but in the second he is not.

In considering the question of contributory negligence on the part of the plaintiff, it is competent for the jury to consider what was said by the conductor at or about the time of the accident. If the testimony of the conductor, McCants, be taken as true—which seems to be fully corroborated by Johnson, the conductor of the sleeping car—asserting that he told the plaintiff to “hold up, the train was going to stop,” it is quite apparent that the injury received by the plaintiff was the result of his own want of prudence and caution, without which it could not have happened, and that he would be barred of a recovery. The law would not tolerate that a passenger, who was encumbered with articles of hand-baggage, should prematurely step from a train of moving cars in the darkness of night, while running at the speed of six or eight miles per hour, against the advice of the conductor in charge, when he had no reason to believe that the train would not stop as usual at the platform of a regular station, with the locality of which he is shown to have been acquainted. This would be an act of carelessness by which he himself might clearly be adjudged to be the author of his own injury. *Shear. & Redf. Neg.* §§ 281, 283; *Central R.R. etc. Co. v. Letcher*, 69 Ala. 106; *Ala. Gr. S. R.R. Co. v. Hawk*, 72 Ala. 112; *Gothard v. Ala. Gr. S. R.R. Co.*, 67 Ala. 114.

The plaintiff, however, denies that he was warned by the conductor to hold up, or not to jump, but that the language used by him was to “hurry up, we have no time,” or words of this import. This conflict in the evidence is not to be dealt with by this court, but is to be resolved by the jury upon the usual principles by which the credibility of witnesses should be determined. We have no right to assume that they will not do this upon their consciences as upright men, free from the influence of every prejudice, as it will be their sworn duty to do. If, in the discharge of this duty, they can justly arrive at the conclusion that the statement of the plaintiff on this point should be believed, rather than that of the two other witnesses, by whom he is contradicted, the question will arise as to what effect the language used by the conductor will

operate to excuse the conduct of the plaintiff, so as to exempt him from the imputation of contributory negligence. If the conductor told the plaintiff to "hurry up, we have no time," would this excuse the premature egress of plaintiff from the passenger car in a manner which would have been an act of inexcusable negligence without such direction or declaration by the conductor?

There are numerous cases where the question has been considered as to the effect of *advice* or *directions* given to passengers by conductors or others, in the management of vehicles and railroad trains. Two propositions seem to be settled by the authorities, which may be stated as follows: First, such advice, though plain and unambiguous, cannot be held to excuse an act of negligence on the part of an adult passenger, which would be so opposed to common prudence as to make it an obvious act of recklessness or folly. *R.R. Co. v. Jones*, 95 U. S. 439; *Shear. & Redf. Neg.* § 282. Second, where the act advised to be done is one where the danger would not be apparent to a person of reasonable prudence, and the passenger acts under the influence of such advice given by the conductor or manager in the line of his ordinary duties, it becomes the province of the jury to say how far the plaintiff's negligence may be excused. *Lambeth v. N. C. R.R. Co.*, 66 N. C. 494; *Cleveland, etc. R.R. Co. v. Manson*, 30 Ohio St. 451; *McIntyre v. N. Y. C. R.R. Co.*, 37 N. Y. 287; *Penn. R.R. Co. v. McCloskey*, 23 Penn. St. 526; *Woods' Field's Corp.* (2d ed.) 756, § 497, note.

We can not know under which of these principles the case may be made to fall by the evidence introduced on another trial. We do not seek, therefore, to make any application of them in detail. This we leave to the wisdom of the court below, without further discussion.

Reversed and remanded.

RICKETTS v. BIRMINGHAM STREET RAILWAY COMPANY. (1)

Supreme Court, Alabama, December, 1888.

[Reported in 85 Ala. 601.]

CONTRIBUTORY NEGLIGENCE TO STEP FROM A MOVING CAR WHEN PASSENGER IS ENCUMBERED.—If the plaintiff, a passenger, was standing on the front steps of the car, with a keg of lead in his hands, when the car started, and without necessity attempted, while it was in motion, to step off and was thrown down and injured, when he would not have been injured had he remained on the car steps, he was guilty of such negligence as will defeat a recovery by him.

APPEAL from the City Court of Birmingham.

Action by William A. Ricketts to recover damages for personal injuries in attempting to step from a street car alleged to belong to the defendant corporation. The injury occurred on March 4, 1887, and the action was commenced on July 14, 1887. Defendant pleaded not guilty, and contributory negligence on the part of the plaintiff himself; and issue was joined on these pleas. "On the trial," as the bill of exceptions states, "the testimony of the plaintiff tended to show that, on the afternoon of March 4, 1887, he started home from his shop in Birmingham with a fifty-pound keg of white lead, and got on a street car at Second avenue, placing the white lead on the front platform by consent of the driver; that he rode to Avondale, and stopped the car when in front of Sumner's store, got off at the rear, and walked to the front of the car to get his lead; that while he was in the act of removing it the car started forward suddenly, struck him and threw him on the ground; that he was badly hurt, was prevented from going to his work for nearly a month, and has never entirely recovered from the injuries he received."

T. C. Thompson, a witness for defendant, who was a director of the Pratt Mines Street Railway Company, another corporation, "was asked who was owning and operating the Birmingham Street Railway on the 4th of March, 1887, and answered that the

1. Cited in Cent. R.R. v. Miles, McLaren v. Ala. Mid. R. Co., 100 88 Ala. 256, 2 Am. Neg. Cas. 29; Ala. 506, 2 Am. Neg. Cas. 107.

Pratt Mines Railway Company was the owner of, and operating said railway at that time; and that he knew the fact from having seen the written contract of sale to said Pratt Mines Company, and from having been one of the parties to said contract of sale, which was made on the 4th February, 1887." To this question and answer, each, the plaintiff objected, and duly excepted to the overruling of his objections. "The testimony of O. W. Underwood, a witness for plaintiff, tended to show that, after the plaintiff was injured, he met George L. Morris on the street car, who, as plaintiff's testimony tended to show, was the president of the defendant corporation on the 4th March, 1887, and asked him if he was still in control of said street railway; and that said Morris replied that he was, and that he would turn over the management to the new company on a certain date, which said witness did not remember." This answer was excluded by the court, on objection by the defendant, and the plaintiff excepted.

Plaintiff asked several charges, and excepted to their refusal. He also excepted to the following charges, which were given at the instance of the defendant: 1. "If the jury believe from the evidence that the plaintiff was standing on the steps in front of the car, with a keg of lead in his hands, when the car started forward; and that he, without necessity, undertook to step off to the ground, while the car was in motion, and that such action on his part was not that of an ordinarily prudent man under like circumstances; and that he would not have been injured, if he had remained on the steps; then the defendant is entitled to a verdict, unless the jury further believe from the evidence that the injury to the plaintiff was inflicted recklessly, wantonly, or intentionally." 2. "In order to entitle the plaintiff to recover, the evidence must show that the defendant was operating the street railway at the time of the injury to the plaintiff." 3. "If the jury believe from the evidence that the defendant was not operating the street railway upon which said injury to plaintiff occurred at the time of said injury, but that the same was operated by the Birmingham & Pratt Mines Railway Company, by its agents and servants, then the defendant is entitled to a verdict."

The charges given, the refusal of the charges asked, and the several rulings on evidence to which exceptions were reserved, are assigned as error.

GARRETT & UNDERWOOD, for appellant, cited : *R.R. Co. v. Winans*, 17 How. (U. S.) 30; *R.R. Co. v. Brown*, 17 Wall. 445; *Thomas v. R.R. Co.*, 101 U. S. 71; *Boone on Corp.* § 243, note 23; *Grand Lodge v. Waddell*, 36 Ala. 313; *Ala. Gold Life Ins. Co. v. Central A. & M. Assoc.*, 54 Ala. 77; *Chambers v. Falkner*, 65 Ala. 454; *Granger's Life Ins. Co. v. Kamper*, 73 Ala. 340; *M. & O. R.R. Co. v. Thomas*, 42 Ala. 715; *Deering on Neg.* §§ 277, 304.

HEWITT, WALKER & PORTER, for appellee, cited : *East v. Pace*, 57 Ala. 521; *Street v. Nelson*, 67 Ala. 504; *Winslow v. State*, 76 Ala. 42; 67 Ala. 290; *Henry v. Northern Bank*, 63 Ala. 527; *Smith v. Plankroad Co.*, 30 Ala. 650; *Ready v. Mayor, etc.*, 6 Ala. 327.

Clopton, J.—Appellant brings the action to recover for injuries suffered by being struck by a street car, in which he had been transported as a passenger, and which he was then leaving. The complaint avers that the defendant, being a corporation incorporated under the laws of Alabama, was the owner of the street railway over which the car was being run. The defendant does not dispute having at one time owned and operated the street railway, but seeks to avoid responsibility by alleging that, about a month previous to the injury, it sold the railway to another corporation, which was operating it at the time. To establish this defense, the defendant was allowed to prove by the witness, Thompson, that the Pratt Mines Company was, at the time of the injury, March 4, 1887, the owner of and operating the street railway, and that he (witness) knew the fact from having seen the written contract of sale, to which he was a party, which sale was made February 4, 1887. The testimony of the witness goes beyond proof of the mere execution of the contract, to the extent that its effect was to transfer the ownership to the purchasing company, which involved the opinion of the witness as to the legal effect of the contract. *Shorter v. Shepherd*, 33 Ala. 648. The ownership of personal property, which may be transferred without writing, may be proved as a fact without producing the contract of sale, though in writing, when the question is incidental or collateral. But it is a familiar principle that parol evidence is inadmissible in reference to contracts required by law to be in writing. *Jonas v. Field*, 83 Ala. 445; *Lecroy v.*

Wiggins, 31 Ala. 13. The title to realty can be transferred only by written instrument. Possession, accompanied by acts of ownership, may be proved, and constitute *prima facie* evidence of title; but, when the parol evidence extends beyond this, and it appears that the knowledge of the witness is derived from a written contract respecting real estate, such contract must be produced, or its absence accounted for. Patterson *v.* Kicker, 72 Ala. 406; Hussey *v.* Roquemore, 27 Ala. 281; Bell *v.* Davidson, 56 Ala. 444.

The declarations of Morris, the president of the defendant corporation, are not shown to have been made while he was in the performance of his duties as such officer, or while acting for the company, or while transacting any business contemporaneous with the declarations, which they serve to elucidate or explain. The declarations were not within the scope of his authority, and are not binding on the defendant. Danner L. & L. Co. *v.* Stonewall Ins. Co., 77 Ala. 184; Smith *v.* Plankroad Co., 30 Ala. 650.

The question as to the power of the corporation to alienate its rights to use the real and personal property necessary to accomplish the objects of its creation, and also its powers of control and supervision, so as to avoid responsibility for the manner in which the railway is managed and operated, arises on a charge requested by plaintiff, which is not shown to have been in writing, as required by the statute. It has been repeatedly held, that the judgment of the court below will not be reversed for a refusal to give a charge requested, unless it affirmatively appears that it was asked in writing. The charge cannot be properly considered by us. The same observation applies to the other charges asked by plaintiff. Winslow *v.* State, 76 Ala. 42; Wheeliss *v.* Rhodes, 70 Ala. 419; Crosby *v.* Hutchinson, 53 Ala. 5.

There can be no question that the plaintiff was guilty of negligence, which proximately contributed to his injury, if he was standing on the steps in front of the car, with a keg of lead in his hands, when the car was started forward, and without necessity undertook, while the car was in motion, to step off on the ground, and would not have been injured if he had remained on the steps. Stepping from a moving car, without necessity, when injury is caused thereby, which could have been avoided by remaining on

the car—by the exercise of ordinary care—is negligence, which will defeat a recovery because of prior negligence of the agents or servants of the company. *Central R.R. & Banking Co. v. Letcher*, 69 Ala. 106; *Thompson v. Duncan*, 76 Ala. 334. It is true, that the bill of exceptions does not set forth any evidence from which the facts stated in the charge may be inferred; and if there was no such evidence, the charge is erroneous. But the bill of exceptions does not purport to set out all the evidence, and we must presume that there was sufficient on which to predicate the charge.

Important franchises are conferred and duties imposed by the charter and general law upon the defendant as a street railway corporation. From the performance of these duties it cannot absolve itself by a voluntary surrender, without legislative consent, of the whole of its property and franchises to another corporation. Notwithstanding such transfer may have been made, if it was without legislative authority, the defendant remained liable for injuries caused by the negligence of the servants or employees of the transferee, the same as though itself was operating the railway. *R.R. Co. v. Brown*, 17 Wall. 445. In such case, both companies are responsible. In view of the evidence tending to show that the defendant had transferred the ownership and operation of the railway prior to the injury, it was not incumbent on plaintiff, in order to entitle him to recover, to show that the defendant was actually operating the road at the time of the injury. In this aspect of the case, the proper inquiry relates to the legality and validity of the transfer. The charges, which impose upon plaintiff the necessity to show that the railway was actually operated by the defendant at the time of the injury, were calculated to mislead. 2 Wood's Rail. § 490.

Reversed and remanded.

CENTRAL RAILROAD & BANKING CO. v. MILES. (1)

Supreme Court, Alabama, November, 1889.

[Reported in 88 Ala. 256.]

PASSENGER NOT GUILTY OF CONTRIBUTORY NEGLIGENCE IN STEPPING FROM MOVING TRAIN.—In an action for personal injuries where a passenger got up from his seat as soon as the train stopped at the station, and moved towards the door, and when he reached the platform found the train had started, and he was informed by the porter that the train, which was moving at about three miles an hour, would not stop again, stepped to the ground in the direction the train was going, and fell and was injured, he is not guilty of contributory negligence as a matter of law, but the question was properly submitted to the jury.

WHEN RIDING ON PLATFORM NOT NEGLIGENCE.—A passenger who goes on the platform of a train in motion for the purpose of getting off after the train is stopped, and remains thereon only long enough to ascertain that it is not going to stop any longer, is not riding on the platform in violation of the regulation prohibiting such riding.

APPEAL from the Circuit Court of Bullock.

Action by Thos. J. Miles against the appellant corporation, to recover damages for personal injuries sustained by plaintiff on stepping from the platform of the defendant's cars, on which he was a passenger, being thrown to the ground, and having his arm broken. The accident occurred at Inverness in said county, on September 8, 1888; and the action was commenced on January 14, 1889. The pleas were, not guilty and contributory negligence. Plaintiff recovered a judgment on verdict for \$1,260. The facts appear in the opinion. The court charged the jury, on the request of plaintiff, as follows: "If the jury believe from the evidence that the defendant knew plaintiff was a passenger on the train, and was to be carried only to Inverness, and that the train, when it reached Inverness, was not stopped long enough for plaintiff, with reasonable diligence, to have gotten off before it was put in motion; and that plaintiff, in attempting to get off, did no

1. Cited in *North Birm. St. R'y Co. v. Calderwood*, 89 Ala. 247, 2 Am. Neg. Cas. 43; *M. & E. R.R. Co. v. Stewart*, 91 Ala. 421, 2 Am. Neg. Cas. 62; *Highland Ave. etc. R. Co. v. Burt*, 92 Ala. 291, 2 Am. Neg. Cas. 73; *McLaren v. Ala. Mid. R'y Co.*, 100 Ala. 506, 2 Am. Neg. Cas. 97; *Ala. Mid. R'y Co. v. Martin*, 100 Ala. 511.

more than an ordinarily careful and prudent man would have done under like circumstances; and that the injury to plaintiff, if any, resulted from the fact that the train was in motion when he got off,—then the jury must find for the plaintiff." To this charge the defendant excepted.

Defendant requested the following charges in writing, and duly excepted to the refusal of each: 1. "If the jury believe the evidence, they must find for the defendant." 2. "If the jury believe the evidence, that, at the time plaintiff left his seat in the car, he got on the front platform of the car; and that at that time, and just before, the train was in motion; and that he remained on said platform, and was thrown therefrom, and injured as testified to, but had, as soon as he discovered that the train was in motion, sufficient time to resume his seat in the car, without being hurt; then they must find for the defendant, although they may further find from the evidence that, if plaintiff had remained in the car, he would have been carried beyond Inverness." 3. "If the jury believe and find from the evidence that the train of cars was in motion, and the plaintiff jumped from the car while so in motion, and was thereby injured, then their verdict must be for the defendant." 4. "The platforms of railroad cars are to be ordinarily used by passengers only for the purpose of getting on and off the cars, while such cars are not in motion; and if the jury believe from the evidence that the cars, on which plaintiff had been riding from Union Springs to Inverness, were in motion as testified to, and that plaintiff attempted to get off while the car was in motion, and was thereby injured; and that the agents and servants of the defendant did not know of his attempt to so get off in time to prevent him, then their verdict must be for the defendant, although they may further find from the evidence that, if he had acted differently, he would have been carried by the train beyond Inverness." 5. "If the jury believe the evidence of plaintiff and his witnesses, their verdict must be for the defendant." 6. "Railroad companies have the right to make reasonable rules and regulations concerning the conduct of passengers on its trains; and if the jury believe from the evidence that, at the time of the alleged injury to plaintiff, the defendant had made a rule forbidding passengers from riding on the platforms of the cars, such rule was a reasonable one;

and if the jury believe from the evidence that such rule was posted on the doors of the passenger cars, plaintiff was required to observe such rule, although in fact he may not have known of its existence; and if the plaintiff, at or about the time of the alleged injury, got on the front platform of the car in which he had been riding, and asked the porter, or brakeman, whether they were going to stop, and was answered 'No,' or 'Not longer than we have'; and that plaintiff, after such reply, and whilst the train was in motion, attempted and did get off the train, and was thereby injured as testified to, their verdict must be for the defendant." 7. "Rail-road companies have the right to make reasonable rules and regulations concerning the conduct of their passengers, and passengers are bound to comply with such rules and regulations; and if the jury believe from the evidence that, at or before the time of the injury testified to, the defendant did make and have posted on the doors of its cars, a rule forbidding passengers from riding on its platforms, such rule was a reasonable rule; and if the jury believe from the evidence that, on the 8th of September, 1888, plaintiff was a passenger on its cars, and got onto the front platform of a passenger car while the train was in motion, and jumped or got off from the platform to the ground whilst the train was in motion, and was injured as testified to, then their verdict must be for the defendant, although in fact plaintiff did not know of such rule having been made and posted on the car in which plaintiff was a passenger." 8. "Passing over the platform for the purpose of getting out of the train while it is in motion, is a violation of the rule forbidding passengers from riding on the platform." 9. "An attempt by a passenger to get out of the car, while it is moving at the rate of two and a half miles an hour, is of itself negligence; and if the jury believe from all the evidence that plaintiff attempted to get off the train, and to the ground while the cars were moving at the rate of two or three miles an hour, and was injured in consequence of getting off the train while so moving, then such negligence did contribute to plaintiff's injury and he cannot recover."

The charge given by the court, and the refusal of the several charges asked, are assigned as error.

NORMAN & SON, for appellant, cited *Darcomb v. Buffalo R.R. Co.*, 27 Barb. 221; *R.R. Co. v. Bayliss*, 74 Ala. 150; *Biles v.*

standing on the steps, that it was not to stop, or not longer than it had stopped, plaintiff descended the steps, his left hand holding the side rail, and stepped off in the direction the train was moving. He knew there was a bell-rope to signal the engineer to stop the train, but did not pull the rope, as the train was running so slowly he did not think there was any danger. The conductor knew that plaintiff was a passenger, and that Inverness was his point of destination. There is some variance in the evidence as to the length of time the train was stopped, and as to the rate of speed. The evidence on behalf of the plaintiff tends to show, that the rate of speed was two and a half or three miles an hour, or, as one witness states, not more rapid than a fast walk; and on behalf of the defendant, that the rate was four or five miles an hour. It is conceded that plaintiff was injured in consequence of stepping from the car, and there is no serious controversy that the train was not stopped a sufficient time to allow plaintiff to get off.

In determining whether there was contributory negligence, the fact that there was a bell-rope, and plaintiff's omission to resort to it to stop the train, should not be selected and accorded conclusive or controlling force, but only the weight to which it is entitled on a consideration of its connection with the other facts, and of the relative bearing and influence of all attendant circumstances, each upon the other. Another and material element of consideration is the effect upon the mind of the plaintiff produced by the failure of defendant to discharge the unquestionable duty to stop the train long enough to permit him, by the use of due diligence, to get off with safety, and by starting it while he was in the act of leaving the train. By the fault or neglect of defendant's agents, he was placed in a situation that compelled him to choose the delay, trouble and inconvenience of being carried beyond his stopping place and attempting to step off. The wrongful conduct of the company, whereby plaintiff was subjected to an election between two such courses to be pursued, must be taken into consideration. *Johnson v. West. Ches. & P. R.R. Co.*, 70 Pa. St. 357. There is a recognized distinction between the cases where the company is, and where it is not, in fault. The argument that if plaintiff had remained on the train he would not have been injured, and would have had a right of action for having been carried on, does not, under the circumstances of this

case, evoke favorable consideration. Stopping the train at Inverness was tantamount to a direction to the plaintiff to get off, and an assurance that reasonable time would be allowed for that purpose.

The general rule, established by the weight of authorities, is, that where the train is stopped at a station to which the company contracted to carry a passenger, the company is liable if a reasonable time to leave is not afforded, and he is injured in the attempt to alight after it is started, and while in motion, if he does not, in getting off, incur a danger obvious to the mind of a reasonable man. 2 Amer. & Eng. Encyc. Law, 762. But, notwithstanding the company may be in fault, a passenger is not justified, in order to avoid being carried beyond his stopping place, to defy obvious danger, such as an attempt to jump from a train in rapid motion. But an attempt for such purpose is not negligence in law, if the train was stopped, but not a reasonable time, and is moving so slowly that to alight from it would not appear dangerous to a man of ordinary prudence. The plaintiff may or may not have been negligent. Whether negligent or not depends upon the attendant circumstances—the manner in which he descended the steps of the car and stepped off, the rate of speed at which the train was running, the character of the ground, the situation, and other circumstances, if any, calculated to render the attempt dangerous.

As plaintiff was not at fault in starting to leave the train, the inquiry is, did he exercise ordinary care in stepping from the car after he discovered it was in motion. Under the circumstances disclosed by the evidence, this inquiry was properly submitted to the jury. Different minds may reasonably draw different inferences from the undisputed and the controverted facts. *Strand v. Chic. & West. Mich. R.R. Co.*, 28 A. & E. R.R. Cas. 213; *Doss v. M. K. & T. R.R. Co.*, 59 Mo. 27; *Jeff. R.R. Co. v. Hendricks*, 26 Ind. 228; *Penn. R.R. Co. v. Kilgore*, 32 Pa. St. 292; *Cen. R.R. Co. v. Able*, 59 Ill. 131; *Files v. N. Y. C. R.R. Co.*, 49 N. Y. 47; *Lambetti v. N. C. R.R. Co.*, 66 N. C. 494; 31 A. & E. R.R. Cas. 50; 43 Am. Dec. 364; 2 Wood's Rail. 1130-1145.

Appellant further insists, there was contributory negligence on the part of plaintiff, consisting in riding on the platform while the train was moving, in violation of a regulation of defendant.

In *Ala. G. S. R.R. Co. v. Hawk*, 72 Ala. 112, it was held, that such a regulation is reasonable, and that a passenger, who is injured while standing on the platform of a car in motion in violation of the regulation, cannot maintain an action to recover damages for such injury. In that case, the plaintiff went on the platform when the whistle was sounded half a mile from the station at which he intended to get off, and remained thereon until the train passed the depot, when he was precipitated, or fell. In this case, plaintiff went on the platform for the purpose of getting off, after the train was stopped, and remained thereon only long enough to ascertain that it was not going to stop any longer. The platform is the only mode of egress from the car, and if there was no negligence in undertaking to get off, certainly it was not negligence to use the only means provided by the company for doing so. Plaintiff was not riding on the platform in the meaning of the regulation.

Affirmed.

SMITH v. GEORGIA PACIFIC RAILWAY COMPANY. (1)

Supreme Court, Alabama, November, 1889.

[Reported in 88 Ala. 538.]

NEGLIGENCE AS MATTER OF LAW—QUESTIONS NEED NOT BE SUBMITTED TO JURY.—When on clearly proved facts, with the inferences that may be reasonably drawn therefrom, it appears that an injury was caused by the plaintiff's own negligence or without the fault of the defendant, the question of negligence is not required to be submitted to the jury, and the court may give the general affirmative charge in favor of defendant, and any special rulings adverse to the plaintiff will not be grounds for reversal.

WHEN CALLING OUT NAME OF STATION, FOLLOWED BY TRAIN STOPPING, IS NOT AN INVITATION TO ALIGHT.—Calling out the name of a station as it is approached by a train is not an invitation to alight, but when soon thereafter followed by a stoppage of the train it is ordinarily a notice that the station has been reached and a passenger may attempt to get off, unless the indications render it manifest that the

1. Cited and distinguished in *Rich. East Tenn. etc. R. Co. v. Holmes*, & *D. R. Co. v. Smith*, 92 Ala. 97 Ala. 332, 2 Am. Neg. Cas. 92. 237, 2 Am. Neg. Cas. 69; cited in

train had not reached the proper landing place, as in this case, where about one o'clock in the afternoon, after the name of the station was called out, the train stopped in a deep cut, about two hundred yards from the station platform, for the purpose of being sidetracked, to allow another train to pass, and the plaintiff was injured while stepping from the car just as the train moved forward again.

APPEAL from the Circuit Court of Cleburne.

Action by Robert T. Smith against the appellee corporation, to recover damages for personal injuries sustained by plaintiff in attempting to alight from a train of cars on which he was a passenger. The suit was commenced on February 5, 1887. The pleas were not guilty and contributory negligence; and the trial resulted, under the rulings of the court, in a verdict for defendant. Plaintiff reserved several exceptions during the trial, to the rulings of the court on evidence, and to charges given at the instance of defendant; and these rulings are assigned as error. The facts appear in the opinion.

KELLY & SMITH, for appellant, cited: 3 Wood's Rail. 1123, §§ 305, 306; R.R. Co. v. Miles, 88 Ala. 256; R'y Co. v. Locke, 2 Am. St. Rep. 207; Selfeld v. R'y Co., 5 Ib. 173; 74 Iowa, 732; 71 N. Y. 489.

KNOX & BOWIE, for appellee, cited: Bentley v. R'y Co., 86 Ala. 484; Wilson v. L. & N. R.R. Co., 85 Ala. 269; Mitchell v. R'y Co., 51 Mich. 236; 13 Hun, 625.

Clopton, J.—Appellant's injuries, for which he sues, were received while alighting from a train at Heflin, a regular station on defendant's road. His right of recovery is founded on the allegation, that his injury was caused by the negligence of defendant's servants. The specific negligence complained of is alleged to consist in calling out the name of the station, bringing the train to a standstill immediately thereafter, thereby inducing plaintiff to believe and to act upon the belief, that the train had reached the usual place for landing passengers, and suddenly starting it without giving him notice. Plaintiff's act in leaving the train being voluntary, it is incumbent on him, in order to entitle him to a recovery, or before the opinion of a jury is required to be taken as to the question of negligence, to produce evidence from which the inference may be reasonably drawn, that his injury was caused by the negligence of the defendant. We shall therefore direct

our consideration to the question, whether on the facts clearly proved, and having regard to the liberty to draw inferences therefrom, the court would have been justified in taking the question of negligence from the jury; for if on the facts which admit of no dispute, and allowing all adverse inferences, it would have been the duty of the court to set aside the verdict, had one been rendered in favor of plaintiff, and the affirmative charge in favor of defendant was authorized, we need not consider the various rulings of the court. *Bentley v. Ga. Pac. R'y Co.*, 86 Ala. 484.

A railroad company, being a carrier of passengers, is under obligation to use reasonable care to transport them safely. This general duty includes the specific duty not to expose them to unnecessary danger, and not intentionally or negligently mislead them by causing them to reasonably suppose that their point of destination has been reached, and that they may safely alight, when the train is in an improper place. Calling out the name of the station is customary and proper, so that passengers may be informed that the train is approaching the station of their destination, and prepare to get off when it arrives at the platform. The mere announcement of the name of the station is not an invitation to alight; but, when followed by a full stoppage of the train soon thereafter, is, ordinarily, notification that it has arrived at the usual place of landing passengers. Whether the stoppage of the train after such announcement, and before it arrives at the platform, is negligence, depends upon the attendant circumstances. The rule is aptly expressed in *Bridges v. R'y Co.*, 6 Q. B. L. R. 377, (1) by Willes, J.: "It is an announcement by the railway officers that the train is approaching, or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or under circumstances induced and caused by the company, in which the man may reasonably suppose he is getting out at the place where the company intends him to alight. To that extent, calling out is an invitation."

A reference to a few leading cases will aid in the solution of the question, whether, on the facts hereafter stated, plaintiff should or could have supposed that the train had reached the usual place for the discharge of passengers. In *Bridges v. Railway Co.*, *supra*, the executrix and wife sued for injuries suffered

1. See note on p. 41, *post*.

by her husband, which resulted in his death. The train on which he was a passenger had to pass through a tunnel before reaching the main platform. There was within the tunnel a platform, similar to but narrower than the main platform. The train went partially up to the main platform and stopped, the last two carriages remaining in the tunnel, the last but one opposite the small platform, and the last, in which the deceased was riding, opposite a heap of rubbish lying near the track. A passenger, who had alighted on the platform from the carriage next to the last, found the deceased lying on the heap of rubbish fatally injured. There was no light in the tunnel, and it was filled with steam. The name of the station had been called in the usual way. It was ruled, on appeal from the Exchequer Chamber to the House of Lords, that it might be reasonably inferred that the deceased, having heard the name of the station called, and finding that the train had stopped, got out of the carriage, supposing that he would alight on the platform, and that the evidence furnished matter on which it was necessary to take the opinion of a jury. 7 H. L. L. R. 213.

In *Cen. R.R. Co. v. Van Horn*, 38 N. J. L. 133, the name of the station, which was plaintiff's destination, was announced while the train was in motion, and soon after it was brought to a full stop, some distance from the station. The plaintiff went out on the platform of the car for the purpose of alighting, and, while standing thereon, the train was suddenly put in motion towards the depot, whereby she was thrown off and injured. This was at night. It is said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then stop the train short of such station in the nighttime. Such a course would naturally tend to jeopardize passengers; for it would induce them to believe that they had arrived at the station designated, and they would in the ordinary course go to the car platform. At night this must be the inevitable result."

In *Taber v. R.R. Co.*, 71 N. Y. 489, Andrews, J., says: "The plaintiff was justified, under the circumstances, in supposing that she had reached her destination, and that the train was at the place where passengers were to alight; at least, the jury might have come to the conclusion that she was free from negligence. The defendant was bound to take notice of the circumstances, viz.,

that the station had been announced; that passengers for Williards would naturally assume that the train, when it stopped, was at the station, and at the place where they were to alight; that by reason of the darkness of the night and the absence of a depot, or other external indication of a station, passengers, especially those not familiar with surrounding objects, would not by observation know that the train had run beyond the highway crossing; that passengers, in the absence of notice, would, according to the usual custom, start to leave the train as soon as it came to a standstill." In that case, the night was dark, and there was no depot or station light nor anything to indicate the stopping place, which was a highway crossing, to a person not familiar with it. It was held, that whether notice should have been given to the passengers, as a reasonable precaution, that the train was to back, and whether the omission to do so was negligence, was a question for the jury.

On the other hand, in *Mitchell v. Chicago & G. T. R'y Co.*, 51 Mich. 236; s. c., 18 A. & E. R.R. Cas. 176, the plaintiff intended to take another train at the crossing of two railways. Before arriving at the junction, the name of the station was called out, and the train came to a full stop, as required by law, before reaching the crossing. Plaintiff hurried to leave the car, went down the steps where there was no platform, or other convenience for landing, and as she was stepping off, the cars were suddenly started to go forward to the depot, when she fell and was injured. This was in daylight, and it does not appear that any person employed on the train observed her. It was held, that the injury was purely accidental, unless plaintiff was herself negligent, and that the company was not liable. Campbell, J., said: "The only cause of the mischief, leaving defendant's carelessness or negligence out of view, was her mistaken supposition that the cars had stopped at the station, and that she therefore should get out. There was nothing at the spot to indicate a landing place, and there was at the proper place, a short distance further on, a building and platform used for that purpose. The stoppage of the cars was required by statute, as well as by usage, as a precaution against collisions. The calling of the station was not shown to have been out of the usual course, and from the distance mentioned we can hardly see how it could have been

delayed. No one representing the company, whether conductor or brakeman, is shown to have known, or suspected, that plaintiff had put herself in peril, or left her place. Nothing is shown which put them in fault for not knowing this."

We have specially referred to the cases cited, because they distinguish between the instances in which the negligence of the defendant is and is not a question for the jury, and have made the foregoing extracts, because they clearly declare the principles on which the distinction rests. They all concur, that neither the announcement of the station, nor stopping the train before it arrives at the platform, if required by law or usage for the purpose of avoiding collisions or other accidents, is negligence *per se*. In *Bridges v. R'y Co.*, *supra* (1), Baron Pollock observes, in reference to the conduct of the passenger who was injured: "Had he known that the rubbish was there instead of the platform, to jump onto it with such a fall as would break his leg and occasion mortal internal injuries, would indeed have been negligent and rash in the extreme. But it was two hours after sunset, there was no light in the tunnel, and the deceased was nearsighted; and he might well have supposed that he would step on the platform, as did the passenger in the next carriage, with impunity."

1. In *Bridges v. North London Railway Co.*, L. R., 6 Q. B. 377 (Exchequer Chamber, May, 1871), the facts were as follows: Plaintiff's intestate was a passenger upon defendant's road. He was in the habit of riding on this road every day, having a season ticket. He occupied the middle compartment of the last car, as the train approached Highbury, and this part of the train was still in the tunnel leading into the town when the train stopped at the platform. There was evidence that the name "Highbury" was called out, and also that soon after "Keep your seats." The train then moved farther down the platform. The deceased was found in the tunnel suffering from injuries

that eventually caused his death. It appears that the part of the road in the tunnel was in a dangerous condition, and that it was dark and filled with steam. At *nisi prius* a nonsuit was directed, from which ruling plaintiff appealed. *Held*, that the nonsuit was proper, there being no evidence which would warrant the jury finding for plaintiff. *Held*, also, that the mere calling out of the names of stations does not constitute an invitation to alight, but whether it is such an invitation depends on the circumstances of each separate case.

The case was appealed and the order affirming nonsuit was reversed, it being held that there were sufficient facts to go before a jury. L. R. 7 H. L. 213.

It will be observed that in each of the cases in which it was ruled there was evidence of negligence sufficient to be submitted to the jury, there existed the element that, by reason of the want of light or other things, the passenger may have been deceived into supposing the train had arrived at the platform or place where it was intended he should alight. Comparing all the cases, we deduce, that when the name of the station is called, and soon thereafter the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place.

The undisputed facts are : Heflin was the point at which the regular passenger trains met and passed each other. It was customary for the east-bound train, on which plaintiff was a passenger, to take the side track, leaving the main track unobstructed for the passage of the train going westwardly. This was necessary to avoid collision. Heflin was plaintiff's point of destination. As the train was approaching, the name of the station was called as usual, and the train was stopped very soon thereafter, the object being to take the side track. On its stopping, plaintiff went out of the rear door of the car, and was descending with one foot on the first step of the car, and the other about touching the ground, when the train moved forward to go to the depot, which caused him to fall. It was drawn to the usual place for the discharge of passengers, and again stopped. The rear of the car, from which plaintiff was getting off, was about two hundred yards from the depot building, the proper place for the discharge of passengers. The train was first stopped in a cut, about three hundred and sixty feet long, and from five to eleven feet deep. This was in daylight, about one o'clock P. M. Plaintiff had been in Heflin once before ; but, as he states, arrived and departed in the nighttime, and was not about the depot in daytime. Nevertheless, he knew, or ought to have known, that there was a depot at which passengers got off and on the trains, and that it was not in such a cut. All the surroundings indicated that the spot at which plaintiff attempted to leave the train was not the proper place for landing. From the description of the place given by witnesses, and shown by the diagram in evidence, it is unreasonable to

conclude, or infer, that any person possessing the ordinary sense of sight, and using it, could have supposed that the train had arrived at the place where the company intended passengers to get off. It does not appear that any of those in charge of or employed on the train noticed the plaintiff when leaving it, or had cause to suspect his intention to get off. There were no circumstances or surroundings caused by the company which should have induced plaintiff to reasonably suppose he was getting out at the place where the company intended him to alight. The evidence clearly establishes, that his injury was accidental, if not produced by his own negligence. On the undisputed facts, the court would have been justified in giving the affirmative charge in favor of defendant.

Affirmed.

NORTH BIRMINGHAM STREET RAILWAY CO. v. CALDERWOOD. (1)

Supreme Court, Alabama, November, 1889.

[Reported in 89 Ala. 247.]

VARIANCE BETWEEN ALLEGATION AND PROOF.—In an action for injuries received in stepping from the train of a street railroad company as it was starting again, where it was shown that a municipal ordinance required the cars to stop on the west side of the crossing for passengers to alight, and the complaint alleged that the car stopped on that side, but the evidence showed that the injury was received on the east side, there is a fatal variance between allegations and proof.

BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE.—Contributory negligence is defensive matter, and ordinarily the burden of proving it is on the defendant, but this is not so where the plaintiff's own testimony inculcates himself. (2)

1. See also *Calderwood v. Crocker*, 95 Ala. 424, 428; *Tompkins v. Drennan*, 95 Ala. 463; *Pannell v. N. F. & S. R. Co.*, 97 Ala. 318, 2 Am. Neg. Cas. 84.

Cited in *Birm. etc. R'y Co. v. Smith*, 90 Ala. 60, 2 Am. Neg. Cas. 58; *Highland Ave. etc. R. Co. v. Burt*, 92 Ala. 291, 2 Am. Neg. Cas. 73; *Highland Ave. etc. R. Co. v. Winn*, 93 Ala. 306, 2 Am. Neg. Cas. 78; *Ga. Pac. etc. R. Co. v. Davis*, 92 Ala. 312; *Kansas City R.R. Co. v.*

2. The rule as to burden of proving contributory negligence stated in this case is criticised in *Kansas City R.R. Co. v. Crocker*, 95 Ala. 412, 429, declaring that the rule is explained and qualified in later cases.

CHARGE ON CONFLICTING EVIDENCE THAT CAR STOPPED ON RIGHT SIDE OF CROSSING.—Where it was material on which side of a crossing a car stopped at the time the plaintiff was injured, and an ordinance required the car to stop on the west side, a charge to the jury that they may indulge the presumption, where the testimony is conflicting, that the train stopped on the side where by law it was required to stop, is erroneous.

CONTRIBUTORY NEGLIGENCE PROPERLY LEFT TO JURY.—When it appears that the plaintiff was injured while alighting from a street car in which she was a passenger, and there is a conflict on which side of a street the car stopped, one side only being a lawful stopping place, and it appears that the conductor was not in his proper place and the car stopped in apparent response to the pulling of the bell-cord by the plaintiff, and she had reasonable cause to believe that the stop was made for the purpose of allowing her to alight, although the proper stopping place had not been reached, the question of her contributory negligence is properly left to the jury.

APPEAL from the City Court of Birmingham.

Action by Mrs. Martha N. Calderwood against the appellant, a domestic corporation, to recover damages for personal injuries sustained by plaintiff in attempting to alight from one of the defendant's cars at the intersection of First Avenue and Twentieth Street, in the city of Birmingham. The accident occurred on October 2, 1887, and the action was commenced on October 1, 1888. Defendant pleaded not guilty and contributory negligence; and issue was joined on both of those pleas. It appears that plaintiff resided in Mississippi, and was, at the time of the accident, in Birmingham, on a visit to her sister, Mrs. M. G. Cobb, who was with her on the car at the time; that they had gone down-town in the morning, on one of the defendant's trains or cars, and were returning in the afternoon; and that they attempted to alight from the car, on their return, when it stopped in the street at or about the place at which they had entered it in the morning. Plaintiff herself testified, among other things; "I did not know the conductor, nor did anyone come near us to collect fare. I do not know where the conductor was, and I do not know what he was doing. We gave notice by pulling the strap. . . . The only notice given was by pulling this strap, and thereon the car came to a stop. I cannot state how long it stopped, but it was not long enough to enable me to get off, though I started at once. It had come to a full stop when I

moved, and I was in the act of leaving when it started again. I did not hear any signal."

Mrs. Cobb testified: "We got on the dummy at First Avenue, near Twentieth Street; and, on returning, we got off at the same place. . . . I rang the bell by pulling the strap, and the car stopped; and we both arose at once to get off." Other witnesses examined by plaintiff testified only as to the extent of her injuries.

Defendant offered in evidence an ordinance of the city of Birmingham regulating the running and stopping of street cars, which provided, among other things, "that all street cars operated within the corporate limits shall make one stop to receive and deliver passengers between the crossings of the several streets and avenues, and this stop shall be made just beyond the far crossing from said car or dummy, so as to clear the street or avenue from the sidewalk; and any conductor, driver, or engineer operating any car in violation of this ordinance, shall be deemed guilty of a misdemeanor," etc., punishable by fine of not more than \$100. Defendant also offered in evidence the rules and regulations which it had adopted for the running of its cars, and which were in force at the time of the accident to plaintiff. One of these rules was entitled "Conductor's Signals," and was in these words: "One tap of the signal bell is a notice to stop; two taps is a signal to start; three taps of the bell, when the train is at rest, is a signal to back; three taps when the train is running is a signal to stop at once; and four taps is a signal to run slower." Defendant also proved "that a notice printed in large type, seventeen inches long and seven inches high, was posted in four places in each car," in these words: "Passengers must not pull the bell-cord, but motion to the conductor when they wish to get off." Defendant also introduced evidence tending to show that when the conductor gave a single tap of the bell, as a signal to stop, the engineer did not stop the cars until he reached the next regular stopping place or crossing; that the engineer sometimes stopped the cars, without a signal from the conductor, on account of a pressure of vehicles, or other temporary obstructions in the street; and that he moved on again, in such instances, without any signal from the conductor. On this evidence, the theory of the defense was, that the plaintiff was guilty of con-

tributory negligence in attempting to leave the cars when they had been stopped temporarily, without a signal from the conductor, and before reaching the regular stopping place.

The court gave the following, among other charges, at the instance of plaintiff, defendant reserving an exception to each : 2. "Contributory negligence on the part of the plaintiff, to avail as a defense in this action, must be the proximate cause of the injury ; it cannot be invoked as a defense." 3. "The burden of proof, establishing contributory negligence, rests on the defendant." 4. "If the jury believe from the evidence that on the day named plaintiff was a passenger on the defendant's cars ; and that the train stopped on First Avenue, near Twentieth Street, for the purpose of letting the passengers get off ; and the testimony leaves it uncertain whether it stopped on the east or on the west side, then the jury would have the right to infer and indulge the presumption that it stopped on that side where the city ordinance and the rules of the company required it to stop, and not on the side where it was forbidden to stop." 5. "If the jury believe from the evidence that, on the day named, defendant's train, on which plaintiff was a passenger, stopped at First Avenue, near Twentieth Street, on the west side thereof ; and that this was the place at which the trains usually stop for letting off passengers ; and that passengers on the train, including plaintiff, desired to get off,—then it was defendant's duty to stop the train at that time and place a sufficient length of time to allow the passengers to alight from the train ; and if they further believe from the evidence that plaintiff immediately started to get off, and continued with due and reasonable care to get off after she started ; and the train suddenly moved forward, without allowing sufficient time for her to get off, and threw her to the ground with such force as to cause a severe and painful injury, without fault or negligence on her part,—this is an act of negligence on the part of defendant which will sustain an action ; and if the jury further believe from the evidence that, by reason of the negligence of the defendant in thus moving forward its train, and without fault or negligence on the part of the plaintiff, she received a severe and painful injury, and has suffered great mental and physical pain, and that said injury is permanent, and that she has suffered great mental and physical pain as the proximate cause thereof,

then they may find for the plaintiff, for such amount of damages as the proof may show she ought to receive."

Defendant requested the following, among other charges in writing, and duly excepted to their refusal: 1. "If the jury believe the evidence in this case, they must find for the defendant." 2. "If the jury believe from the evidence that, on October 2d, 1887, on plaintiff's return from North Birmingham on defendant's train, she attempted to leave the train on the east side of Twentieth Street, without giving notice to the conductor in charge of the train, then they must find for the defendant, unless the proof further shows that the conductor, or some other employee of the defendant, knew of her purpose to leave the train in time to warn her not to make the attempt, and failed to give such warning." 3. "There is no evidence before the jury showing, or tending to show, negligence on the part of the defendant, or any of its employees or servants, which caused or contributed to the injuries of which plaintiff complains; and the jury must therefore find for the defendant, without regard to the plaintiff's hurts, injuries, or sufferings." 4. "Every person of mature years is bound to know the law; and in the consideration of this case, the jury must regard the plaintiff as having known, on October 2d, 1887, the laws of the city of Birmingham fixing the stations of street railroads at which they were required to receive and deliver passengers, and prohibiting them from stopping elsewhere for that purpose; and if the evidence satisfies the jury that a train stopping at Twentieth Street, aforesaid, on returning from North Birmingham, was forbidden by law to stop on the east side of said street, then they must find for the defendant, unless the proof further shows that plaintiff, before attempting to leave the train, had given notice to the conductor, or some other servant of the defendant on the train, plainly and distinctly, of her purpose to leave said train on the east side of said street, and that said conductor (or other servant of defendant) knew she was about to leave the train in time to prevent her being injured in the attempt to do so, and negligently failed to take steps to prevent such injury; and that the mere pulling of the conductor's signal-bell cord, or what was supposed by the plaintiff to be such bell-cord, by the plaintiff or some other passenger, without the knowledge or consent of the conductor, would

not be such notice of plaintiff's purpose to leave the train, either to the conductor, or to any other servant of the defendant on said train." 5. "The defendant had the right and it was its duty to make and enforce all reasonable and proper rules and regulations for the safe running of its trains and the safe transportation of its passengers; and if the jury believe from the evidence that one of these rules and regulations forbade passengers to pull the conductor's signal-bell cord, and that this was a reasonable and proper regulation, and that the defendant and its servants had exercised reasonable and proper diligence to bring it to the knowledge of the public, and of passengers on its trains, including the plaintiff; and if the jury believe from the evidence that the plaintiff might, by reasonable care, have known said regulations, either from the notices printed on the schedules, or from the placards posted up in the car in which she was traveling; and that plaintiff, without the knowledge or consent of the conductor, violated this regulation, and usurped the functions of the conductor, by pulling what she supposed was the conductor's signal-bell cord; or, if she, in conjunction and agreement with Mrs. Cobb, or any other person, pulled said bell-cord, in the attempt to stop the train at a point where it was by law forbidden to stop for the purpose of receiving or delivering passengers, or for any purpose except to prevent accidents, or in case of necessity; and that the plaintiff then attempted to leave said train, where it was by law forbidden to stop to receive or discharge passengers, and in such attempt was hurt as alleged in the complaint, then they must find for the defendant." 7. "If the jury believe from the evidence that while the plaintiff was being carried as a passenger on the defendant's train going westward on First Avenue, and approaching the east side of Twentieth Street, pulled the conductor's bell-cord, without his knowledge or consent, in response to which the engineer stopped the train at a place where by the laws of the city he was forbidden to stop for discharging or receiving passengers; and that plaintiff was injured while attempting to get off the train, by the engineer starting it again according to the requirements of the laws of the city, without knowledge or notice of plaintiff's purpose or attempt to get off there, and without any orders from the conductor to start again; then the injuries received by plaintiff were the result of her own act, and she cannot recover anything in

this action." 8. "If the jury believe from the evidence that the damage of which the plaintiff complains was on the east side of Twentieth Street in the city of Birmingham, then, under the allegations of the complaint, the jury must find for the defendant."

The charges given, and the refusal of the several charges asked, are assigned as error.

GARRETT & UNDERWOOD, for appellant.

A. Y. HARPER and R. G. COBB, for appellee.

Somerville, J.—The action is brought for an injury received by the plaintiff in stepping from the train of the defendant's street railroad, which was operated by a steam dummy-engine in the city of Birmingham. The verdict of the jury was for the plaintiff, in the sum of \$5,000 damages. The alleged negligence of the defendant, as averred in the complaint, was the failure of the engineer of the train to stop a sufficient length of time to enable the plaintiff to safely alight on the west side of Twentieth Street, where trains were accustomed to stop to deliver passengers.

1. The defendant, in the eighth charge, requested the court to instruct the jury that, if they believed from the evidence that the damage complained of was received on the east side of said street, then, under the allegations of the complaint, the jury must find for the defendant—in other words, that there would be a fatal variance between the allegations and the proof.

We think, under the facts of the case, the place of stopping was material, and that the court erred in not giving the charge. It was shown by the evidence that a municipal ordinance of the city, regulating the running and stopping of street cars, required each stop to be made just beyond the far crossing from the car, or dummy-engine, "so as to clear the street or avenue from the sidewalk," and prohibited a violation of this regulation under a penalty as a misdemeanor. The ordinance thus prohibited trains to stop on the east side of streets when moving westward, or on the west side when moving eastward, either to receive or to deliver passengers. They were required to cross the street before coming to a stop. And the evidence shows this was the custom of the company except in cases of necessity to avoid accident or collision with vehicles or pedestrians.

The train, in this case, was moving westward at the time of the accident. The lawful stopping place, therefore, was on the west

side of Twentieth Street. It was unlawful to stop on the east side for the purpose of allowing a passenger to alight.

The contract of the defendant with the plaintiff, as a passenger on its cars, must necessarily imply an agreement to stop on the west, and not on the east side. The duties, therefore, imposed by law on the defendant's servants were materially different at the two places. At the lawful stopping place they were compelled to stop to deliver the plaintiff, on receiving proper notice of her desire to stop, or show some lawful excuse for their failure to do so. This stop was required to be for a time reasonably sufficient to enable her to conveniently alight. *Central R.R. Co. v. Miles*, 6 South. Rep. 696; 88 Ala. 256. And the duty of keeping a diligent lookout rested on the engineer and conductor, to see that a premature start of the train, such as might endanger her safety, should not be negligently made. No such duties were required at a place where it was unlawful to stop for the purpose of delivering passengers, unless those in charge of the train elected to stop in violation of law, and thereby induced the plaintiff to alight. In such case, on being informed of her presence and desire, they would presumptively be chargeable with negligence if they failed to stop for a time reasonably sufficient to permit a safe exit from the train.

The case of the *Western Railway of Ala. v. Sistrunk*, 85 Ala. 352, is distinguishable from this case, on the obvious ground that the alleged variance of place there was immaterial, the duties of the defendant to the plaintiff being precisely identical at each.

For the error of refusing this charge, the judgment of the City Court must be reversed.

2. Contributory negligence is defensive matter, and the burden of establishing it is ordinarily cast on the defendant; but this is not a correct proposition where the plaintiff's own testimony, which seeks to fix negligence on the defendant, inculcates himself also, as it tends to do in this case. *S. & M. R.R. Co. v. Shearer*, 58 Ala. 672. Or, to state the proposition otherwise: "When the plaintiff shows negligence on part of the defendant, and there is nothing to imply that the plaintiff brought on the injury by his own negligence, then the burden of proof is on the defendant, to show that the plaintiff was guilty of negligence." *Cassidy v. Angell*, 34 Am. Rep. 690; *Whart. on Negl.* §§ 423,

425. The third charge requested by the plaintiff should not have been given.

3. So, the second charge would have been less liable to mislead, if it had asserted that contributory negligence cannot be invoked as a defense, unless it is *a* proximate cause, instead of *the* proximate cause of the injury. It need not be the *sole* cause, but it is sufficient if it be one of two or more concurring efficient causes. *Sistrunk's case, supra.*

4. The fourth charge given for the plaintiff was also erroneous; whether the train stopped on the west or the east side of the street was a material issue on the trial, and it should have been determined by the jury on the evidence, without reference to any presumption supposed to arise from duty to stop on the west side, which was imposed by the city ordinance.

5. There was some evidence from which the jury, in our judgment, were authorized to infer that the stoppage was on the west side of the street, and the objection to the fifth charge requested by plaintiff, based on this ground, is not tenable. If this instruction had limited the amount of recovery to that claimed in the complaint, we see no error.

6. The question of the plaintiff's alleged contributory negligence was properly left to the jury as a question of fact. We would not, under the evidence, be justified in deciding it adversely to her as a matter of law. *L. & N. R.R. Co. v. Perry*, 87 Ala. 392, and cases cited. If the conductor was not in his place on the car, and the train stopped anywhere on the street in apparent response to the pulling of the bell-cord by the plaintiff, and she, believing reasonably that the stop was made for the purpose of allowing her to alight, attempted to do so, the question of her contributory negligence would be one of fact to be properly left to the jury. In this view, all of the defendant's charges, from the first to the fifth, inclusive, and also the seventh, were erroneous and properly refused. And the fifth charge was misleading because it excluded the phase of the case last adverted to by us, involving the duties arising from a stoppage at another than lawful station or place for the delivery of passengers.

7. The plaintiff, in our judgment, must be held to know the rule of stopping on the farther side of the street, as prescribed by the city ordinance. "It is well established, that the residents

within a municipality must take notice of the ordinances, and it is frequently stated, that ordinances have the force and effect of laws within the limits of the corporation." Municipal Police Ord. (Horr & Bemis) 158. This principle seems sound, when applied to any person within a municipality, who contracts, even by implication, with reference to such ordinances, when operative as police regulations. The contract here, as we have seen, by necessary intendment was, that the delivery of the plaintiff as a passenger was to be at a regular stopping place, such as would not be violative of any existing and lawful police regulation. This devolved on her the responsibility of informing herself of what we may pronounce an everyday incident of street-railway travel. *Mitchell v. Chicago R'y Co.*, 51 Mich. 236.

The foregoing view is not inconsistent with the principle settled in this State, but denied in many other jurisdictions, that courts will not take judicial notice of municipal by-laws, but require them to be proved as facts. *Case v. Mayor of Mobile*, 30 Ala. 538; *Munic. Pol. Ord.* (Horr & Bemis) 158. Nor with the rule, that such an ordinance will not be permitted to create a civil right in favor of a third person, based on the negligence of one failing to obey it. *Henry v. Sprague*, 23 Am. Rep. 502; *Flynn v. Canton Co.*, 17 Ib. 603; *Kirby v. Boylston Market Asso.*, 74 Am. Dec. 682.

Reversed and remanded.

BIRMINGHAM UNION RAILWAY CO. v. HALE. (1)

Supreme Court, Alabama, November, 1889.

[Reported in 90 Ala. 8.]

DECLARATION OF PATIENT TO PHYSICIAN IS ADMISSIBLE.—

A physician, who attended the plaintiff, may testify in an action for injuries, that when he first saw her "she was complaining of pain from an injury she said she had received."

IMPEACHING WITNESS BY PROVING CHARACTER.—In seeking to impeach a witness by examining his character, the inquiry is not limited to character for truth and veracity, but may extend to his general moral character. But immoral conduct in any one particular cannot be

(1) Cited in *Mitchell v. State*, 94 Ala. 73; *Rhea v. State*, 100 Ala. 122.

put in evidence for this purpose, and so, though the general reputation of a woman who has a notorious character of want of chastity may be testified to, the mere fact that she is a prostitute or keeps a house of ill-fame cannot.

BURDEN OF PROOF AS TO NEGLIGENCE—WHEN IMPOSED ON RAILWAY COMPANY IN ACTION FOR INJURIES.—In an action for damages for injuries, when it is proved that the injuries were received while the plaintiff was alighting from a car of a street railway company, and were caused by the driver starting the car with a jerk while the plaintiff was in the act of alighting, a *prima facie* case of negligence in the management of the car is established, and the burden of proof is shifted to the railway company.

APPEAL from the Circuit Court of Jefferson.

Action by Mrs. Sarah H. Hale, against the appellant, a domestic corporation organized under the general statutes, to recover damages for personal injuries sustained by plaintiff as she attempted to alight from one of the defendant's street cars in Birmingham, alleged to have been caused by the negligent act of the driver in starting the car "with a jerk" as she was in the act of alighting. The accident occurred on February 2, 1889, and the action was commenced on February 19, 1889. The only plea was the general issue. The jury awarded the plaintiff \$500 damages. Plaintiff testified on the trial as to the circumstances attending the accident, and the nature and extent of the injuries she received, and said that she suffered a miscarriage in consequence of her injuries during the ensuing night. Dr. Whaley, who was called to her assistance the next day, testified to the nature and extent of her personal injuries; said that she had evidently suffered a miscarriage, and further, "When I first saw her, she was complaining of pain *from an injury she said she had received.*" Defendant moved to exclude from the jury the words which are italicized, and excepted to the overruling of the motion. At the time of the accident, the plaintiff and her husband were occupying rooms which they rented from Mrs. A. Rowland, and to which plaintiff was carried immediately after the accident. Mrs. Rowland was examined as a witness for plaintiff, and testified as to her injuries, the length of time she was confined, etc. On cross-examination, Mrs. Rowland testified: "I resided in South Highlands for a short time, and moved away from there, for one reason, because I was not able to pay rent." For the purpose of

impeaching the character of this witness, and of contradicting her testimony, the defendant offered one Hagood as a witness, who was the marshal of the South Highlands while she resided there; and proposed to prove by him, 1, that she there kept a house of ill-fame, and 2, that she left the place in obedience to orders of the municipal authorities. The court excluded this evidence, and the defendant excepted. W. L. Hughes, the driver of the car by which the plaintiff was injured as she testified, was examined as a witness for the defendant, denied that she was injured on alighting from his car, and said that she walked off after alighting, leaning on her husband's arm; and the defendant introduced other evidence contradicting plaintiff's testimony in several material particulars.

Defendant asked the following charges in writing, and duly excepted to the refusal of each of them: 1. "If the jury believe that plaintiff has been contradicted by the witnesses, as to any material parts of her testimony—such as the point where she got off the car and where she got on again; whether or not she was injured in getting off, and whether or not she told her doctor that defendant's driver was taking a drink at the time of the accident—such contradictions may raise such a doubt in the minds of the jury, as to whether she has told the truth, as would authorize them to disregard her testimony." 2. "If the jury believe that the injury complained of occurred in getting off defendant's car on Second Avenue and Twenty-sixth Street, they must find for the defendant." 3. "If the jury believe the testimony of the plaintiff in her own behalf, they must find for the defendant." 4. "The burden is on the plaintiff to prove that she was injured in getting off defendant's car, by the carelessness of defendant's driver; and if all the testimony in the case leaves the jury in uncertainty as to whether she was so injured, the jury must find for defendant." 5. "It was only the duty of the defendant's driver to stop his car a reasonable time to allow plaintiff to alight from it; and if he did so he was using ordinary diligence; and the burden of proving that the car was not so stopped is on the plaintiff."

The refusal of the several charges asked, and the rulings on evidence, are assigned as error.

HEWITT, WALKER & PORTER, for appellant.

BUSH, BROWN & WEBB, and TALIAFERRO & VAUGHAN, for appellee.

Clopton, J.—The physician who attended the plaintiff was permitted to testify that, when he first saw her, “she was complaining of pain from an injury she said she had received.” As to statements made to the physician by a party who is the subject of the injury, the rule of exclusion extends to declarations as to its cause, or the way in which it occurred; these being regarded as mere narratives of past events, which must be proved by other and independent evidence. But, from the necessity of the case, he may testify to the party’s statements as to his symptoms, the locality and character of the pain, and explanation of his bodily condition, made while suffering, and for the purpose of enabling the physician to form an opinion of the nature and extent of the injury. *Eccles v. Bates*, 26 Ala. 655; *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Ill. Cent. R.R. Co. v. Sutton*, 42 Ill. 438. The statements of plaintiff, to which objection was made, come within the rule last stated; they related to the pain of which she was complaining, as having been produced by an injury, without reference to its cause or manner of occurrence. The court did not err in refusing to exclude the testimony. 1 Whart. Ev. § 263.

2. It is undoubtedly the rule of practice in this State, too well and long settled to be departed from, that in examining into the character of a witness sought to be impeached, the inquiry is not limited to character for truth and veracity, but may extend to his general moral character. Notwithstanding such extension of the rule, immoral conduct in any one particular, however it may bear on the question of general character, cannot be put in evidence for this purpose. By a notorious want of chastity, a female will certainly obtain a bad character, and her general reputation, if she has acquired any, may be given in evidence to impeach her; but not the particular and independent fact that she is a prostitute, or keeps a house of ill-fame. The cause producing her bad character cannot be inquired into, unless on cross-examination. *Holland v. Barnes*, 53 Ala. 83; *Motes v. Bates*, 80 Ala. 387. The evidence as to the character of the house kept by the witness sought to be discredited, and as to the orders of the municipal authorities in reference to her, was properly excluded.

3. The first charge requested by defendant is argumentative. We have repeatedly declared that mere arguments on specific parts of the evidence, which may be properly addressed to the jury, should not be formulated into legal propositions, and announced to them as such. There is no error in refusing charges of this character. *Hussey v. State*, 86 Ala. 34 ; *Hawes v. State*, 88 Ala. 37.

4. That a party suing for damages, for an injury caused by the negligence of another, has on him the burden to prove such negligence, and that it was the proximate cause of the injury, is an elementary principle. Necessity has modified the rule in the case of a passenger on a railway train, but not to the extent of entire exemption from the necessity to make a *prima facie* case of negligence. Proof of mere injury, without more, does not raise a presumption of negligence sufficient to impose on the company the burden to prove due care on its part. In order to recover, it is incumbent on plaintiff to show an accident from which the injury resulted, or circumstances of such character as impute negligence. Railway companies are bound to exercise a high degree of care in providing tracks and plants, locomotives and cars, competent and skillful employees, and all other agencies and appliances required in the safe transportation of passengers and freight. When it is shown that an accident happens which would not ordinarily have happened if due care and foresight had been exercised—such as from the derailment of the train, or defect of the track or machinery, or from a collision, or from the breakage, or defective condition of any of the appliances employed in the business, or the method of their use—negligence may be presumed, or inferred ; proof of an accident of such nature, or under such circumstances, establishes a *prima facie* case of negligence. *D. L. and W. R.R. Co. v. Napheys*, 1 Am. and Eng. R.R. Cas. 52-59, n. ; 2 Wood's Rail. 1096, n. ; 1 Whart. Ev. § 359. The rule is clearly and comprehensively stated in *Transportation Co. v. Downer*, 11 Wall. 129, by Field, J. : " A presumption of negligence from the simple occurrence of an accident seldom arises, except when the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over

which the defendant has immediate control, and for the management and construction of which he is responsible."

The injury occurred on a street car drawn by horses. When plaintiff proved that, on the stoppage of the car, she at once walked out on the platform to get off, and while in the act of alighting, the driver suddenly started the car with a jerk, which caused her to fall, whereby she was injured, she established a *prima facie* case of negligence in the management of the car; the burden of proof, which primarily rested on her, was uplifted, and the burden of disproof thrown on defendant. She was not required to make, in the first instance, other and further proof, that the car did not stop long enough to enable her to get off with safety. On the case made by the evidence, negligence *vel non* became a question of inquiry by the jury on the entire testimony. *Ga. Pac. R'y Co. v. Hughes*, 87 Ala. 610.

When the evidence is in equipoise, the verdict must be against the party on whom the burden of proof primarily rested; but, in a civil case, a verdict may be based upon a preponderance of the evidence, if such preponderance is sufficient to satisfy the minds of the jury. *Vandewater v. Ford*, 60 Ala. 610. It can seldom be said that the issue is not in uncertainty to some degree, whenever there is a conflict of evidence. The latter clause of the charge requested by defendant, to the effect that if all the testimony in the case left the jury in uncertainty as to whether the plaintiff was injured by the carelessness of defendant's driver, they must find for the defendant, lays down the rule too exactly; the jury would probably have understood from the instruction that they must be clearly convinced. The fourth and fifth charges asked by defendant, as framed, were calculated to mislead the jury as to the measure of proof. *Wilkinson v. Searcy*, 76 Ala. 176; *Lehman v. Kelly*, 68 Ala. 192.

Affirmed.

BIRMINGHAM UNION RAILWAY CO. v. SMITH. (1)*Supreme Court, Alabama, November, 1889.*

. [Reported in 90 Ala. 60.]

NEGLIGENCE TO START A STREET CAR WHILE A PASSENGER IS ALIGHTING.—It is the duty of the driver of a street railway car drawn by horses, when signaled to stop, not only to stop a reasonable time to allow passengers to alight, but to see and know before he starts the car again, that no passenger is in the act of alighting, or in any other perilous position, and if he fail in any of these respects, and an injury results, the railway company is liable.

APPEAL from the Circuit Court of Jefferson.

Action by Malinda Smith against the appellant, a corporation engaged in operating a line of street railway cars, in Birmingham and vicinity, to recover damages for personal injuries sustained by plaintiff as she alighted from one of the cars on which she had been riding as a passenger. Suit was commenced August 27, 1888. The cause was tried on issue joined on the pleas of not guilty and contributory negligence, and resulted in a verdict for plaintiff for \$1,000. The facts of the case are thus stated in the bill of exceptions: "The plaintiff introduced evidence tending to show that, on June 27, 1888, she was a passenger on one of the defendant's street cars near Avondale, in said county; that it was a close car, was full of passengers, and was drawn by mules, the place for passengers to get off and on being at the rear end; that another passenger in the car rang the bell in Avondale, and the car stopped; that the driver was then standing in the centre of the front platform, and had control of the car, there being no conductor; that plaintiff rose from her seat while the car was standing still, and went to the rear end to get off; that four or five other persons got off before her, and as she was in the act of stepping from the car, before both of her feet were off, the car started with a jerk, and she was thrown to the ground with her face down, after making three or four quick steps straight out from the car; and that she was assisted in getting off the car by

1. Cited in *Highland Ave. etc. R. Co. v. Burt*, 92 Ala. 291, 2 Am. Neg. Cas. 73; *G. & A. R'y Co. v. Causler*, 97 Ala. 235, 2 Am. Neg. Cas. 85; *L. & N. R. Co. v. Lee*, 97 Ala. 325, 2 Am. Neg. Cas. 91.

one Weiser, who placed his hand under her arm, but removed it as she was stepping from the car, and about the time the car started. The evidence of the plaintiff showed, also, that she was injured by said fall, the character of said injuries, and that her fall was caused by the said starting of the car while she was in the act of stepping from it to the ground; and there was evidence on the part of the defendant tending to show that her fall was not caused by the starting of the car, or any other fault of the defendant. The bell in the car was provided for passengers to ring, when they desired the cars stopped to allow them to get off. The plaintiff's evidence showed, also, that she arose from her seat as soon as the car stopped, and proceeded to get out, and went out as fast and as quick as she could in view of the crowded condition of the car, and of the fact that other passengers were also going out, some of whom preceded her; and there was no conflict in the evidence on this point, except the testimony of the driver, hereinafter set out, as to the length of time the car stopped. There was no evidence in the case, on behalf of either party, tending to show that the car started any earlier than at the point of time at which plaintiff was in the act of stepping from it to the ground. Defendant introduced evidence tending to show that it was the duty of the driver of said car to stand on the front platform, where he could control the mules and the brakes; that it was his duty to stop the car when the bell was rung, for those passengers to get off who desired to do so; that the bell was rung, and the car was stopped, just before the time when plaintiff got off said car, and remained at a standstill the usual length of time for those passengers to alight who desired to do so, that is, a minute or more; that the car was standing still when the plaintiff got off; that she stepped from the car, and stumbled and fell after taking three or four steps on the ground, and that there was no jerking or starting of the car at the time she was alighting from it."

This being "all the evidence in the case," defendant requested five charges in writing, and duly excepted to their refusal. The fourth and fifth charges are in the opinion, and the others were as follows: 1. "If the jury believe from the evidence that the moment plaintiff started to get off the car was simultaneous with the starting of the car, they must find for the defendant." 2. "If

the evidence in the case leaves the jury in doubt and uncertainty whether the car was put in motion when plaintiff was in the act of getting off, or whether the moment she started to get off was simultaneous with the starting of the car, then they must find for the defendant." 3. "If the jury believe from the evidence that the car was in motion when the plaintiff attempted to get off, they must find for the defendant."

The refusal of each of the charges asked is assigned as error.

HEWITT, WALKER & PORTER, for appellant, cited: *R.R. Co. v. Jones*, 83 Ala. 376; *Poulin v. R'y Co.*, 61 N. Y. 621; *Raben v. R.R. Co.*, 33 A. & E. R.R. Cas. 520; *Strauss v. R.R. Co.*, 27 Ib. 179; *Brown v. R.R. Co.*, 8 Ib. 383; *Shear. & Redf. Neg.* § 508.

STERRETT & CAMPBELL, for appellee, cited: *R'y Co. v. Munford*, 3 A. & E. R.R. Cas. 312-15; 36 N. Y. 378-81; 38 N. Y. 131; 75 Penn. St. 83; 5 Amer. Rep. 71; *Thomp. on Carr. of Pass.* 443.

McClellan, J.—The exceptions reserved go to the action of the trial court in refusing to give five charges requested by the defendant below. Of these the first, second and third were abstract. We find no evidence in the record tending to show "that the moment the plaintiff started to get off the car was simultaneous with the starting of the car," or "that the car was in motion when the plaintiff attempted to get off the car;" and these are the facts upon which these charges based defendant's right to a verdict. On the contrary, plaintiff's evidence tended to show that the car was standing still when she attempted to get off, and was started forward "with a jerk" when that attempt had been so far executed as that she was in the act of stepping off, having one foot on the step and the other approaching, if it had not touched, the ground; and the evidence of defendant tended to show that the plaintiff was entirely off and free from the car before it was again started.

The fourth and fifth charges requested by defendant, and refused, present the real question involved on this appeal. They are as follows: 4. "If the car was stopped a sufficient length of time for the plaintiff to get off the car, by the exercise of ordinary diligence, then you must find for the defendant, unless you believe from the evidence that the driver started the car in

motion while the plaintiff was getting off the car, and knew she was getting off the car when he started the car." 5. "If the defendant's car was stopped for a reasonable length of time, sufficient to have permitted the plaintiff to have gotten off safely by the exercise of reasonable diligence on her part, then you must find for the defendant, unless the evidence shows that defendant's cardriver knew, or had good reason to know, that plaintiff was in the act of getting off the car, or in a place of danger when he started the car."

The doctrine of these charges, certainly as formulated in the last charge quoted, is thoroughly well established with respect to the ordinary railways of the country. *Raben v. Central Iowa R'y Co.*, 33 Am. & E. R.R. Cas. 520, and cases cited; *Strauss v. C. St. J. & C. B. R.R. Co.*, 27 Ib. 170; S.C., 75 Mo. 175; 86 Mo. 421; *G. C. & S. F. R.R. Co. v. Williams*, 8 S. W. Rep. 78; *Penn. R.R. Co. v. Peters*, 30 Am. & E. R.R. Cas. 607-614.

Trains on such railroads are run on schedules. They stop only at designated stations, to receive and discharge passengers. The conductor knows in advance how many passengers are to alight at a given station. He may, therefore, determine with sufficient accuracy what would be a reasonable time for the train to stop to enable passengers for that station to alight, by the exercise of ordinary diligence on their part. The law, therefore, imposes on him the duty of holding the train for such reasonably sufficient time. It is not practicable for him to keep a watch upon all the exits from a train of cars. Not infrequently he has other things to do at stations where his train stops. The law, therefore, does not impose on him the duty of seeing and knowing that all of the passengers, intending so to do, have alighted. Unless he knows or has good reason to believe to the contrary, he may act upon the presumption that passengers have availed themselves of the ample time allowed, and gotten off the train. These reasons, which support the proposition of the fifth charge, as to the cross-country steam railways, do not obtain with respect to a horsecar railway. They have no stations, no regular stopping places, no schedules. The driver cannot know beforehand where any passenger intends to alight, or how many passengers desire to get off at any place where he is signaled to stop. When he is signaled to stop he must then inform himself by looking and seeing as to

how many of his passengers desire and intend to alight. Without this he can have no conception of the length of time the car should remain stationary. Having rendered his car immovable by applying the brakes, he has nothing else to do than to see who intend getting off, and to know that they are safely off before the car is again started. It is entirely practicable for him to do this. The only exits are under his immediate observation, and there is no other duty incumbent on him at the time to divert his attention from them and the alighting passengers.

Our opinion is, that it is the duty of the driver of a horsecar, when signaled to stop, at least to ascertain who and how many of his passengers intend to alight at that place, to wait a sufficient length of time to enable them to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car, when he again puts the car in motion. If he fail in any of these respects, and injury results from such failure, his employer is liable. *Thompson on Carriers*, p. 443; *Poulin v. B. & S. Av. R.R. Co.*, 61 N. Y. 621; *Nichols v. S. Av. R.R. Co.*, 38 N. Y. 131; *Chic. City R'y Co. v. Mumford*, 3 Am. & E. R.R. Cas. 312-315. See, also, *N. B. St. R.R. Co. v. Calderwood*, 7 So. Rep. 360; 89 Ala. 247.

Charges 4 and 5 were, therefore, properly refused; and the judgment is affirmed.

MONTGOMERY & EUFAULA RAILROAD CO. v. STEWART. (1)

Supreme Court, Alabama, November, 1890.

[Reported in 91 Ala. 421.]

ATTEMPTING TO BOARD A MOVING TRAIN—WHEN NOT NEGLIGENCE.—A person who attempts to board a moving train which should have come to a full stop at the station at which he was waiting, but only slackens its speed to the rate of about two miles an hour and the conductor called out "All aboard," is not guilty of negligence.

1. Cited in *Highland Ave. etc. R. Co. v. Burt*, 92 Ala. 291, 2 Am. Neg. Cas. 73; *Highland Ave. etc. Co. v. Winn*, 93 Ala. 306, 2 Am. Neg. Cas. 78; *N. B. R'y Co. v. Liddicoat*, 99 Ala. 545, 2 Am. Neg. Cas. 99; *McLaren v. Ala. Mid. R'y Co.*, 100 Ala. 506, 2 Am. Neg. Cas.

Under the facts stated, conceding that the passenger was guilty of negligence in attempting to get on the moving train, the railroad would be liable for injuries sustained when it was proved that the conductor, although he saw the dangerous position of the passenger, gave the signal for the train to proceed faster, and the sudden increase of speed caused the passenger to be knocked down and injured.

MOVING TRAIN FROM STATION—NEGLIGENCE.—Ordinarily a train is only required to stop at a station sufficiently long to enable passengers to get on or off by the exercise of due care and diligence in safety, but when passengers are invited to board a train that only slackens its speed to a slow rate, it is incumbent on the railway employees before increasing the speed of the train to see that no passenger in attempting to get on or off is placed in a dangerous position.

CHARGE TO BE CONSTRUED AS A WHOLE.—A general charge of the court *ex mero motu* should be considered as a whole; and if, taken as a whole, it states the law correctly, it will not be a ground for reversal if any part taken by itself is faulty.

PLAINTIFF MAY TESTIFY TO HABIT OF GETTING ON AND OFF TRAINS.—In connection with all the attendant circumstances the plaintiff may be allowed to testify that he had been in the habit for fifteen years of getting on and off the defendant's trains at the station where the accident occurred.

APPEAL from the Circuit Court of Montgomery.

Action by James R. Stewart against the appellant corporation, to recover damages for personal injuries sustained by him while attempting to get on board of a train of cars at Perry's Mills, a station on defendant's road, about twelve or fifteen miles below Montgomery. According to plaintiff's testimony, when the train approached the station, the customary signal was given for it to stop, and the signal was answered as usual; but the train, instead of stopping, only checked its speed to about two miles an hour; and on the conductor calling out "All aboard," plaintiff caught hold of the hand railing at the end of one of the cars, and attempted to ascend the steps, but failed to do so, was dragged some distance, thrown to the ground, and sustained serious injuries in his arm and shoulder. There was a demurrer to each count of the complaint, which was overruled; and issue was

107; Ga. Pac. etc. R. Co. v. Lee, 92 Ala. 271; Ala. G. S. R. Co. v. Frazier, 93 Ala. 47; Ala. G. S. R. Co. v. Hill, 93 Ala. 322; R. & D. R. Co. v. Farmer, 97 Ala. 146; Pannell v. N. F. & S. R. Co., 97 Ala. 304; Ala. etc. R. Co. v. Martin, 100 Ala. 511; L. & N. R. Co. v. Hurt, 101 Ala. 513.

joined on the pleas of not guilty and contributory negligence. Under the rulings of the court, the plaintiff had a judgment on verdict for \$1,500. The assignments of error embrace all the rulings on the pleadings and evidence, charges given, and the refusal of charges asked.

ARRINGTON & GRAHAM, for appellant.

TOMPKINS & TROY, for appellee.

McClellan, J.—It is not controverted that the train which caused the injury complained of should have been, and was not, brought to a full stop at Perry's Mill, on the occasion in question. Its speed was reduced to a rate not in excess of two miles an hour, in recognition of a signal to stop; and it proceeded past the station at that rate, giving no indications of coming to a standstill, but, on the contrary, it seemed that the employees had no intention of stopping, or affording persons intending to take passage any further opportunity to do so, than was incident to the slow rate to which the speed of the train had been reduced. The gravamen of each count of the complaint is, that while the plaintiff, who intended, was entitled, and was attempting to board the cars, was in such juxtaposition with them as that any sudden and unexpected acceleration of their speed involved great peril to him, the conductor, with a full knowledge of plaintiff's position, caused the train to lurch forward "with a jerk," so violently and unexpectedly as to throw plaintiff to the ground, and inflict the injuries complained of. It is wholly immaterial on the case thus presented, whether plaintiff himself was negligent in assuming the position he occupied, or whether he assumed it on the invitation, or at the direction of the defendant's employees. Their knowledge that he had assumed it, which is alleged, and which is supported by a tendency of the evidence, coupled with the knowledge, which must be imputed to them, that to suddenly increase the speed of a train while he was so situated would naturally endanger him, devolved upon them the duty, not only of using all reasonable effort to avoid disaster to him, if his position was perilous in and of itself, but also, and this whether the position was in itself a dangerous one or not, the imperative duty of abstaining from any act which would increase existing peril, or create danger where none existed before. Conceding, therefore, that plaintiff was negligent in attempting to board the moving

train as alleged in the first count, or in holding onto the railing of the steps and keeping pace with the train, as alleged in the second count, yet, if the danger might have been avoided by due care on the part of defendant's employees after they discovered the peril, or if the injury would not have been inflicted but for their affirmative act in negligently increasing the speed of the train, knowing that thereby plaintiff's safety would be imperiled, as they must be holden to have known, the defendant company is liable notwithstanding the plaintiff's own original negligence. *Thomp. on Trial*, § 1683; *Williams v. N. P. R. Co.*, 11 *Am. & E. R.R. Cas.* 421; *R.R. Co. v. Stern*, 19 *Ib.* 30; *Romick v. R.R. Co.*, 15 *Ib.* 288; *Beenes v. R.R. Co.*, 10 *Ib.*, 658; *Kelly v. R.R. Co.*, 35 *Ib.* 396; *Hays v. R.R. Co.*, 34 *Ib.* 97; *R.R. Co. v. Burdye*, 18 *Ib.* 192; *Frazer v. S. & N. R.R. Co.*, 81 *Ala.* 185.

Moreover, we are by no means prepared to say, that on the case as presented by the first count of the complaint, and supported by a tendency of the testimony, the plaintiff was guilty of contributory negligence at all. The test in this connection is not always found in the failure to exercise the best judgment, or use the wisest precautions; the influences which ordinarily govern human action are to be considered, and what would under some circumstances be a want of due care would not be such under others. *Lent v. N. Y. C. etc. R.R. Co.*, 120 *N. Y.* 467. Indeed, we apprehend that it can in no case be said, as matter of law, to be negligence to get on or off a train moving at a rate of speed not in excess of two miles an hour, *C. R. & B. Co. v. Miles*, 88 *Ala.* 256; and this wholly irrespective of any invitation or direction to alight or board emanating from employees, or deducible from circumstances.

In this case, however, it is alleged, and the averment is supported by the testimony offered for the plaintiff, that the conductor, while the train was in motion, and to all appearances would not come to a full stop at all, instructed or directed the plaintiff to get on the cars, by calling out to him "All aboard." The danger of an attempt to board not being obvious, as we have said, the law is well, and has been long settled, that the plaintiff was in no wise negligent, or lacking in due care, to rely upon the assurance thus impliedly given by the employee, that it was safe to make the attempt to board in compliance with the direction of

the conductor. 2 Am. and Eng. Encyc. of Law, 762; *Bucher v. N. Y. C. etc. R.R. Co.*, 98 N. Y. 128; *R.R. Co. v. Leopley*, 27 Am. and Eng. R.R. Cas. 167; *Lent v. N. Y. C. etc. R.R. Co.*, 120 N. Y. 467; *Filer v. R.R. Co.*, 59 N. Y. 351; *B. & O. R.R. Co. v. Kane*, 69 Md. 11; S. C., 9 Am. St. Rep. 387; *Bridges v. U. St. R'y Co.*, 12 Am. St. Rep. 518; *Cincinnati R'y Co. v. Cooper*, 112 Ind. 26; *C. R. & B. Co. v. Miles*, 88 Ala. 256.

But, aside from all this, the situation created by defendant's servants, as averred, and as supported by the tendencies of the evidence, was in itself an invitation, to those waiting at that station for the train, to get aboard it, and in the nature of an authoritative assurance that it was safe for them to do so. Confessedly the train ought to have stopped, was signaled to stop, recognized the signal, and slowed down to a speed of not exceeding two miles an hour in partial obedience to it. Confessedly, also, it did not stop, nor were any indications given of a purpose on the part of those in control of it to come to a full stop; but, on the contrary, a tendency of the evidence goes to show that no intention to fully stop was evinced, or even entertained; and to all appearances the only opportunity meant to be afforded plaintiff to get on was such as he might enjoy from the maintenance, while passing the station, of the low rate of speed to which the train had been reduced. That a situation, so to speak, or an aspect of affairs, may be produced by trainmen which will as fully import an invitation or direction to action on the part of passengers as would oral instructions by employees, we do not doubt. *Solomon v. Manhattan R'y Co.*, 103 N. Y. 437. That, if the jury found the facts stated above, and which are alleged in the complaint, to exist, they would have been authorized to find further that an invitation to plaintiff to board the train was involved in them, is equally clear. So finding, it follows, as a matter of course, the danger not being obvious, that plaintiff was not negligent in making the attempt to get on the slowly moving train. Authorities *supra*.

Moreover, if the facts referred to were found by the jury, they involved and served to impose another important duty upon defendant's employees, with respect to the knowledge they must have that no passenger is in a position of danger before accelerating the movement of the train. Ordinarily the full duty of train-

men in that connection is performed when the train is brought to a standstill for a length of time which is reasonably sufficient to enable passengers to get on or off by the exercise of due care and diligence on their part; and when this is done there is no duty resting on employees to see and know that passengers desiring to alight have done so, or that persons desiring to take passage are safely on board. *Raben v. R'y Co.*, 35 N. W. Rep. 645; *Straus v. R'y Co.*, 75 Mo. 185; S. C., 86 Mo. 421; *R'y Co. v. Williams*, 8 S. W. Rep. 78; *R.R. Co. v. Peters*, 9 Atl. Rep. 317.

Where, however, a reasonable opportunity is not afforded by holding the train stationary for passengers to get on or off, but they are invited and expected to do so while the train is moving at a low rate of speed, a different rule ought to obtain, and in our opinion does obtain. An invitation thus conveyed implies, at least, an assurance that the momentum will not be increased until all persons desiring to come aboard have done so, and imposes a correlative duty on those in charge of the train not to increase the speed, without knowing that no person intending to act on the invitation is so situated as to be imperiled thereby. They cannot, in other words, acquit themselves by merely maintaining the slow movement sufficiently long for persons with diligence to get on, for this itself is a wrong; and as there is no obligation on the would-be passenger to avail himself of such an invitation, though he may do so without negligence, they have no right to assume that he will avail himself of it immediately, or at all, in fact; but they must know that it has been acted on, and that there is no one in an exposed position when the increased motion is imparted to the train. And even were it conceded that the plaintiff was negligent, notwithstanding the invitation or direction conveyed to him by the situation, because there was obvious danger in so acting, it was none the less the duty of the defendant's employees to see that the *status quo* was maintained while the effort was being made; and the company would be liable for the consequences of their failure to do so, notwithstanding the prior negligence of the plaintiff.

The evidence was conflicting as to whether the train was suddenly started off "with a jerk" while plaintiff was in the act of stepping upon the cars. There was no conflict, however, as to the points that the conductor saw the plaintiff when the attempt

was made, and that he then signaled the engineer to go forward. The jury may have found that that signal was obeyed, and the train made thereby to lurch suddenly forward, causing the injury complained of. We are not prepared to say but that they might have legitimately reached the further conclusion, that the act of the conductor, done with a knowledge of plaintiff's position, was also done with a sense on the part of the conductor of the probable consequences of such sudden movement to the plaintiff, and unregardful of his safety. If so, this would be such gross negligence and recklessness on the part of the conductor as would be the legal equivalent of that wantonness and intentional wrongdoing which affords a predicate for the imposition of punitive or vindictive damages. *A. G. S. R.R. Co. v. Arnold*, 80 Ala. 600; *A. G. S. R.R. Co. v. Hill*, 8 So. Rep. 90; *L. & N. R.R. Co. v. Watson*, at present term.

Under the principles we have declared, each count of the complaint presented a good cause of action, and the demurrers were properly overruled. Conceding that it appears from each count that plaintiff was guilty of contributory negligence, yet each presents a case upon which recovery might be had notwithstanding such contributory negligence. But the first count does not show contributory negligence at all. On the facts there alleged, the act of the plaintiff was not negligent.

A careful examination of the charge of the court, which is set out *in extenso*, leads us to the conclusion, that construed, as it must be, with reference to the evidence, it is free from error. It may be that some of its passages, which are separately excepted to and assigned as error, would be objectionable, standing alone, and dissociated from the parts which precede and follow them. But the doctrine is well settled in this court, that the general charge given *ex mero motu* in the court below should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of its context; and if any part, when so considered, limited or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty the clause might be, if its meaning were not controlled by prior or subsequent passages. *Williams v. State*, 83 Ala. 68; *O'Donnell v. Rodiger*, 76 Ala. 222. Read in this way, every proposition asserted by

the trial court, which is made the basis of an assignment here, is supported by one or another of the doctrines we have considered and declared above, which also serve to determine the exceptions reserved to the refusal of the court to give the instructions requested by the defendant, against the appellant.

The custom and usage of the defendant in respect to stopping its trains at Perry's Mill, and as to the signal to stop, the response to it indicating that it had been seen, etc., the precise point of stopping, length of time the train remained stationary ordinarily; and moreover, the knowledge of these things on the part of the plaintiff, as affecting the reasonableness of some of his acts, especially some of those alleged in the second count of the complaint, were matters involved in the issue presented and tried below. As relevant to these matters, and certainly to plaintiff's knowledge in respect to them, the fact that he had been in the habit of getting on and off trains at that point for fifteen years, we think, was properly allowed to go to the jury.

The judgment of the Circuit Court is affirmed.

RICHMOND & DANVILLE RAILROAD CO. v. SMITH. (1)

Supreme Court, Alabama, November, 1890.

[Reported in 92 Ala. 237.]

WHEN STOPPAGE OF TRAIN AFTER CALLING OUT NAME OF STATION IS AN INVITATION TO PASSENGER TO ALIGHT.

—Calling out the name of a station as it is approached by a train is not an invitation to alight; but if it is soon thereafter brought to a full stop a passenger may safely conclude, in the absence of notice, that the train has arrived at the station, and attempt to get off, unless the surroundings would indicate to a prudent man that it had not reached the proper landing place. And where, as in this case, the facts show that about five o'clock on a very dark morning, after the porter had twice called the name of the station, the train stopped at a water tank some seventy-five yards short of the station, and the conductor testified that it had never stopped there before, the plaintiff, a passenger, is not guilty of contributory negligence in alighting, and, if injured by stepping on trestle, the company will be liable.

1. Distinguishing *Smith v. Ga. Pac. Ry. Co.*, 88 Ala. 538.

Cited in *E. Tenn. etc. Co. v. Holmes*, 97 Ala. 332, 2 Am. Neg. Cas. 12.

APPEAL from the City Court of Birmingham.

Action by the appellee, F. W. Smith, against the appellant corporation to recover damages for injuries suffered by the plaintiff, which were caused by the alleged negligence of the defendant. The facts appear in the opinion. The case was tried without the intervention of a jury, and upon the evidence introduced, the court rendered judgment for the plaintiff, from which the defendant appealed.

JAMES WEATHERLY, for appellant, cited: *Smith v. Ga. Pac. R'y Co.*, 88 Ala. 538; *Taber v. R.R. Co.*, 11 N. Y. 489; *A. G. S. R.R. Co. v. Arnold*, 84 Ala. 172; *A.G. S. R.R. Co. v. Arnold*, 80 Ala. 604.

J. M. MCMASTER, for appellee, cited: *Smith v. Ga. Pac. R'y Co.*, 88 Ala. 538; *Wood's Rail.* § 305, p. 1123.

Clopton, J.—In *Smith v. Ga. Pac. R'y Co.*, 88 Ala. 538, the following propositions were declared: The announcement of the name of a station, being usually intended to inform the passengers that the train is approaching the point of their destination, so that they may prepare to get off when the train stops, is not, of itself, an invitation to alight; but if the train is soon thereafter brought to a full stop, a passenger may safely conclude, in the absence of notice, that the train has arrived at the station, and attempt to get off, unless the surroundings and circumstances are such as would show to a reasonably careful and prudent man that the train had not reached the proper landing place. These propositions rest on reason and experience, are justified by custom, conform to the understanding of railroad carriers and the traveling public, and are maintained by the strong current of authority. When a passenger, acting in such case, under a reasonable belief that the train has stopped at his point of destination, endeavors to get off, using ordinary care, and is injured in consequence of the train having stopped short thereof, the company is liable. 18 Am. & E. R.R. Cas. 179.

Application of these principles will suffice for the proper determination of this appeal. The following facts are undisputed: Plaintiff was a passenger on defendant's train, Coalburg being his point of destination. At the usual place the engineer blew the whistle, announcing the approach of the train to Coalburg, and the porter twice called the name of the station in the car

where the plaintiff was seated. A few moments thereafter, the train was brought to a standstill at a water tank about seventy-five yards short of the station. Thereupon the plaintiff immediately left his seat, followed by his companion, for the purpose of getting off, walked to the front platform of the car, took hold of the rail with his right hand, and, losing his balance, stepped off and fell through a trestle over which the car was standing. It was not usual for the train to stop at the tank; the conductor testified that it had never stopped there before within his recollection. The reason for stopping on this occasion was, that owing to delay caused by a wreck on the road, the engine got out of water, which fact was unknown to the conductor and other train employees. Not knowing that the engineer intended stopping the train at the tank, and supposing it had arrived at the station, the conductor, who was in the same car with plaintiff, passed through to the front platform of the second-class coach. The bare statement of these facts, without argument, shows their sufficiency to induce a reasonable belief, that the train had arrived at the proper stopping place. The conductor, who was familiar with the road, so believed, and certainly more will not be required of a passenger.

This brings the question, whether the surroundings were such as fairly indicated that the place, where plaintiff attempted to get off, was not the station, and whether he exercised such care as will relieve him of contributory negligence. These questions may be considered together. It was about five o'clock in the morning and very dark. There was a building at the station near the road but no platform. The ground, which had been made smooth and level with cinders, was eight or ten inches from the steps of the coach. There was a light in the station house, but as to whether it could be seen from the outside the evidence was conflicting; the preponderance supporting the contention of plaintiff that it could not be seen, at least from where he attempted to get off. There were bright lights in the coaches, and there is evidence tending to show that the trestle could be seen by these lights, but the testimony of the conductor is, that he required the aid of his lantern to see the trestle from the platform, and it does not appear that he observed the trestle when he passed out of the car; he did not discover his mistake as to the train not being at

the station until he had reached the front platform of the coach next in front of the car in which plaintiff was seated. Comparing the facts in this case with those in *Smith v. Ga. Pac. R'y Co.*, *supra*, the difference in the cases consists in stopping a train at midday in a long, deep cut, clearly showing that it was not at the landing place, and stopping in the darkness of the night at a place without any such indications; also, in stopping a train at a point where it was customary and necessary, and at a point where it had never been stopped before.

It was the duty of the railroad company to provide at the station suitable and safe egress from the train, and plaintiff had the right to presume, and act on the presumption, that this duty had been performed. He was not required to stop on the platform of the car and look for a trestle, the presence of which he had no cause to suspect. Having been induced by the conduct of the company's employees to reasonably believe that the train was at the station, he was also authorized to believe that he could descend the steps to the ground with safety. The name of the station having been announced, it was natural that the passengers destined for Coalburg would commence to leave the train as soon as it was brought to a full stop, and the stopping of the train, under such circumstances on a dark night, jeopardized the passengers. The train having been stopped at an unusual place, short of the station, it was the duty of those in charge to use all due precaution to protect the passengers from injury, especially when it is dark and the train is stopped on a trestle or other place of danger. Some notice or warning should have been given. The conductor's ignorance of the intention to stop the train at the tank is no excuse; due precaution required the engineer, who knew the necessity to get water and the danger of the place, to inform the conductor, or some other employee, that the passengers might be notified or warned not to get off. Human life cannot be thus carelessly endangered with impunity. 18 Am. & E. R.R. Cas. 272.

An examination of the evidence satisfies us that the plaintiff's injury was the natural and proximate result of the negligence of defendant's employees, and that his negligence did not contribute thereto. The case having been tried without a jury, it is unnecessary to consider the rulings on evidence; for if the conductor

had been allowed to answer the questions objected to, it would not have changed the result.

Affirmed.

HIGHLAND AVENUE & BELT RAILROAD CO. v. BURT. (1)

Supreme Court, Alabama, November, 1890.

[Reported in 92 Ala. 291.]

STARTING CARS—CONDUCTOR'S DUTY—PASSENGER ALIGHTING. — In the case of ordinary railroads, after a conductor has waited at a regular station a reasonable length of time to permit passengers to get on or off the train, he may then start it, unless he sees some person in the act of alighting or in a like perilous position, but where the cars are drawn by horses or dummy engines, and there are no fixed stopping places, it is the duty of the conductor not only to stop a reasonable time, but before giving the signal to start, to see that no passenger is in the act of alighting.

APPEAL from the Circuit Court of Jefferson.

Action by the appellee, Margaret A. Burt, against the appellant corporation, to recover damages for personal injuries, alleged to have been sustained on account of the negligence of the defendant's employees. Plaintiff's testimony tended to show that she boarded one of the defendant's dummy trains in Birmingham; that upon paying her fare she told the conductor she wanted to get off at St. John's Church, and to put her off at that place, to which he nodded his consent; that when the cars arrived at St. John's Church they stopped, and several passengers got off; that plaintiff arose from her seat in the car as soon as it had stopped; that while she was alighting therefrom, the cars, in response to a signal from the conductor, started off with a jerk, throwing her to the ground, causing the injuries complained of in this action; that she arose from her seat in the car and proceeded to alight as quickly as possible, and without delay. Defendant's testimony tended to show that its said train stopped at St. John's Church a reasonable length of time to enable passengers to alight therefrom; that several did alight from said train at that point, and were assisted by the conductor of the train; that before the con-

1. Cited in *G. & A. R. Co. v. Causler*, 97 Ala. 235, 2 Am. Neg. Cas. 85.

ductor signaled to the engineer of said train he looked to see if there was anyone else who wished to get off, and, seeing no one, he signaled the engineer to start. The evidence also showed that plaintiff got off the car on the opposite side from which the other passengers alighted.

Upon all the evidence, the court charged the jury as follows: "That it was the duty of defendant, on reaching the stopping place at St. John's Church, to stop the dummy a reasonable length of time for plaintiff to alight, and plaintiff's duty, when it stopped, to alight with reasonable diligence; that when it stopped, if the conductor went to the car in which plaintiff was, to help the passengers off, and if, during such reasonable time given for passengers to alight, plaintiff was up and in the act of alighting, it was the duty of the conductor to know it, and not start the train while she was in the act of alighting; that if the train stopped a reasonable length of time for the plaintiff to alight, and at the expiration of such time she was still in her seat and not in the act of getting off, then the conductor had the right to turn his attention away from the car to the engineer, and to signal the engineer to go ahead; and if thereafter plaintiff arose and attempted to alight and fell, the defendant is not liable, unless the conductor or engineer actually knew she was trying to get off, and, so knowing it, could, by the exercise of reasonable care, have prevented her fall."

Defendant requested the court to give the following written charges, and excepted to the refusal to give each of them as asked: 1. "That if the train stopped a sufficient time to allow the plaintiff to get off, then the defendant was not guilty of negligence in its management." 2. "That if the jury believe that the car stopped at St. John's Church a sufficient time for plaintiff to alight, and the conductor, without knowing of the intention of plaintiff to alight there, and without knowing or seeing that she was in the act of alighting, started the train, then the defendant would not be guilty of negligence, and plaintiff would not be entitled to recover." 3. "If the jury believe from the evidence that the train came to a full stop at the place where the plaintiff wished to alight, and remained there long enough for two ladies in another seat of the car to alight therefrom safely, then, on the undisputed evidence, as to the character and construction of the

car in which plaintiff was riding, this was a reasonable time for the car to stop for the plaintiff to alight." 4. "That if the jury believe from the evidence that the train of the defendant was stopped at St. John's Church for a reasonable time for plaintiff to have alighted from the car, then, after this time, the conductor was not required to be on the lookout for the plaintiff to alight." 5. "Under the evidence in this case, the train stopped at St. John's Church a reasonable time for plaintiff to alight."

Judgment was rendered for plaintiff; and defendant appealed, assigning as error the refusal of the court to give the charges asked by it.

ALEX. T. LONDON, for appellant, cited: *M. & E. R.R. Co. v. Stewart*, 91 Ala. 421; *B. U. R'y Co. v. Smith*, 90 Ala. 60; *Strauss v. R.R. Co.*, 75 Mo. 185; 6 Am. & E. R.R. Cas. 384; *R.R. Co. v. Clotworthy*, 80 Mo. 221; 21 Am. & E. R.R. Cas. 371; *Davis v. R.R. Co.*, 18 Wis. 185; 2 Am. & E. Encyc. of Law, 762; 2 Wood's. R'y Law, 1128, 1129, 1148; *C. & W. R.R. Co. v. Ludden*, 89 Ala. 612, and cases cited.

RICHARD H. FRIES, for appellee, cited: *R.R. Co. v. Calderwood*, 89 Ala. 253; *B. U. R'y Co. v. Hale*, 90 Ala. 8.

Coleman, J.—The plaintiff sued to recover damages for personal injury, alleged to have been sustained in consequence of the negligence of the defendant, by moving forward the train upon which she was a passenger, while she was in the act of alighting, and before she had reasonable time to get off.

We regard the law with respect to the duty to be exercised by ordinary railroads, for the safety of passengers getting on and off their trains, as well settled. When the train of an ordinary railroad is brought to a standstill at the proper and usual place for receiving passengers and for permitting passengers to alight, and remains stationary for a reasonably sufficient length of time for this purpose, the duty of the trainmen in this regard has been performed; but while the performance of this duty may relieve the trainmen from the further duty of seeing and knowing that the passengers are on or off, as the case may be, even this would not excuse from culpability, if those in charge of the train in fact saw or knew that its movement would probably imperil a passenger in the act of getting off or on the train, and in disregard of the peril, caused the train to move and thereby inflict injury.

M. & E. R'y Co. v. Stewart, 91 Ala. 421; 8 So. Rep. 711, and cases cited; B. U. R'y Co. v. Smith, 90 Ala. 63; Central R.R. v. Miles, 88 Ala. 262.

The law has also been well settled in regard to the duty of the driver or the person in charge of a horsecar, operated for the carriage of passengers. In the latter case, it is the duty of the driver to await a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by a movement of the car. If he fail in these respects and injury results from such failure, his employer is liable. 90 Ala. 63, *supra*. The reasons for applying a different principle in the case of ordinary railways and horsecars are fully stated in 8 So. Rep. and 90 Ala. *supra*.

The case of North Birm. St. R'y Co. v. Calderwood, 89 Ala. 247, was one in which the passenger cars were drawn by a dummy engine. Plaintiff testified in that case that she gave the notice to stop by pulling the bell-strap, and upon this signal being given the train stopped. It was in evidence that, by a rule of the company, passengers were required to motion the conductor when they wished to get off. This much of the evidence is stated to show that the rules of the company in regard to stopping, applicable to ordinary railroads having regular stations, did not apply, but in its management, for the convenience of passengers in regard to stopping, was somewhat similar to that of street horsecars; that is, the train would stop, on being signaled to that effect by the passenger, at any place where a municipal ordinance did not prohibit it. After laying down the general rule applicable to ordinary railways, that the stoppage required was for a time reasonably sufficient to enable the passengers to conveniently alight, the court, in 89 Ala. *supra*, added that "the duty of keeping a diligent lookout rested on the engineer and conductor, to see that a premature start of the train, such as might endanger her safety, should not be negligently made."

Where dummy engines are used for the transportation of passengers, and conductors are in the control of the cars, and there are no regular stopping places or stations for receiving and putting off passengers, and the conductors are not informed in ad-

vance where the passengers desire to alight and cannot know how many are expected to alight, when the motion or signal is given to stop, and the rules and conditions for governing such engines and cars for carrying passengers are not such as to invoke the principles which prevail in ordinary railways, the presumption does not arise that the duty of the conductor is performed by merely stopping a reasonable length of time, sufficient to enable passengers to get on or off; but in such cases the same measure of duty is required as that imposed upon the driver of a horse-car; that is, he shall inform himself by looking and seeing how many passengers desire and intend to alight, and, in any event, to see and know that no passenger is in the act of alighting, or in a position which would be rendered perilous by putting the car in motion. If, after stopping and waiting a reasonable time for passengers to get off, the conductor places himself in a position where he can see and know, and there are no indications that others or any desire or intend to alight or get on, the conductor may then cause the car to move, and if passengers, after this, attempt to get on or off, without further notice to the conductor, and he has no actual knowledge of their intention and position, they do so at their peril, and not at the peril of the carrier.

The first and second charges requested by defendant relieved the conductor of the duty to take any precaution or steps to inform himself as to whether plaintiff was in the act of alighting at the time he signaled the engineer to go forward. We are not prepared to hold "that a sufficient time to allow the plaintiff to get off" comes up to the rule declared in repeated decisions of this State, where we have held "that the train must wait a sufficient length of time to enable passengers to alight in safety by the exercise of reasonable diligence," or "to conveniently alight." The charges asked for to this effect were calculated to mislead in respect to the time the train was required to wait.

The court was not authorized to charge the jury as a matter of law, that because two other ladies had alighted with safety, the car had stopped a reasonable time. This may have been matter for legitimate argument before the jury, but did not authorize the legal conclusion. The plaintiff's testimony tended to show that she arose, for the purpose of getting off, as soon as the train

by plaintiff in attempting to alight from a slowly moving car of a "dummy" street railway upon which she was a passenger. The first count, after alleging that the plaintiff notified the conductor as to her destination, that the train was not stopped there, but ran a block beyond, and that it then came almost to a stop for the purpose of letting her off, proceeds: "The said conductor ordered plaintiff to get off, which plaintiff refused to do, because the train was not fully stopped, whereupon the said conductor raised his hand in a threatening manner, as if he, the said conductor, intended forcing plaintiff off, ordering plaintiff again to get off; and plaintiff, being a woman, without protection, and through fear of being pushed off by said conductor, attempted to get off, and in so attempting was thrown to the ground, said fall being caused by the wrongful and malicious act of said conductor in failing to have said train completely stopped before requiring or forcing her to get off, whereby plaintiff received great bodily injury," etc. The second count follows the first up to the attempt of plaintiff to get off the train, and continues: . . . "and plaintiff, through fear of being forced off, attempting to get off of said train, which at the time was running very slow, but, as plaintiff was preparing to get off, the engineer . . . caused the engine to make a sudden jerk, whereby plaintiff was thrown to the ground, and then and there by reason of said fall, caused by the above alleged willful and negligent acts of said conductor and engineer, and without fault on the part of this plaintiff, was badly bruised," etc.

It is thus made to appear that each count of the complaint charges that the defendant's employees *willfully* caused the injuries to plaintiff, for which she now seeks to recover damages. Both counts aver that she attempted to get off, after protesting against being required to do so, through fear superinduced by the threatening attitude of the conductor. The first count further avers that the fall she received in making this coerced attempt was caused by the "wrongful and malicious act of the conductor" in requiring or forcing her to get off while the train was in motion; and in the second count, this fall is ascribed to the "willful and negligent acts of the conductor and engineer." The doctrine of this court is that, under such a complaint, no recovery can be had for mere negligence; willfulness, or its equivalent, reckless-

ness, or wantonness, must be proved. Thus, in the case of *L. & N. R.R. Co. v. Johnston*, 79 Ala. 436, it is said: "The gravamen of the action, as averred in the complaint, is, that the defendant willfully refused to stop the train of cars at Alice Station, the point of plaintiff's destination, and carried her several hundred yards beyond the customary stopping place, where she was compelled to alight, without her consent, and against her protest. It is our opinion that, under this averment of the complaint, there could be no recovery in the action unless the evidence in the cause satisfied the jury that the failure of the defendant's servant to stop the train was willful. If it was merely negligent, without more, there would be a fatal variance between the allegations and the proof."

This principle was adhered to and reannounced in the recent case of *Birm. Min. R.R. Co. v. Jacobs*, 92 Ala. 187, in which it is said, Stone, Ch. J., delivering the opinion: "The first count of the complaint charges that 'the defendant, by and through its conductor, engineer, servants and agents, negligently, wantonly, recklessly and willfully caused, permitted and suffered its said train to run into and against the said engine upon which plaintiff's intestate was as aforesaid, knocking it off the track, and so scalding, bruising and wounding plaintiff's intestate that he died in consequence thereof.' This count, in terms, charges that the defendant's train was willfully caused to be 'run into and against the said engine' of the dummy line. There is no testimony tending to show that the collision was 'willfully caused' by defendant's servants, but the trend of the whole testimony repels such inference. The defendant's sixth charge (which was refused) was confined to the first count of the complaint, and, in effect, asserts that the plaintiff failed to establish the truth of that count. This is the identical question which was raised and ruled on in *Johnston's case*, 79 Ala. 436. While the point may be somewhat technical, we do not feel at liberty to depart from the ruling then made. The sixth charge asked ought to have been given. *Dickson's case*, 88 Ill. 431; 1 *Greenl. Ev.* §§ 51, 63; *Coulton's case*, 86 Ala. 129; *Guinan's case*, 47 Am. Rep. 279."

A like doctrine was declared in the earlier case of *S. & N. R.R. Co. v. Schaufler*, 75 Ala. 136, where the averment was that

the plaintiff "was *compelled* and *forced* by the agents of said defendants to get off defendants' train while in motion, and before said train had reached the usual place at the depot." Somerville, J., rendering the opinion of the court, said: "We fail to discover in the record any evidence to support this averment of the complaint. There is no fact stated which tends to prove that the plaintiff was compelled or forced in any manner by defendant's agents or anyone else to leave the train. . . . There was, for this reason, a material disagreement between the allegations of the complaint and the proof which constituted a fatal variance," etc.

The evidence in this case, on the part of the plaintiff, is open to two interpretations, one of which leads to the conclusion of force or threats and willfulness, on the part of the conductor, and the other tends to show that he was negligent only. If the jury found that plaintiff's attempt to alight was due to a coercion of her will by the manifestations and directions of the conductor, she protesting against having to do so while the train was yet in motion, and the injuries resulted proximately from this alone, or from it and another cause conjointly, this would have been such force and willfulness as is laid in the complaint, although there was no laying on of hands, and no actual hostile demonstration made by the conductor. *A. G. S. R.R. Co. v. Sellers*, 93 Ala. 9. On the other hand, if their conclusion was that plaintiff attempted to alight voluntarily, upon the invitation and pacific insistence of the conductor, nothing more than negligence can be imputed to him—the omission of duty in failing to stop at plaintiff's destination, thus furnishing an occasion for her to get off further on, and the want of care in requesting her to get off before the train stopped at this further point.

Again, the evidence as to the custom of lessening the speed of the train without stopping it at that point, to enable an employee to get off and throw the switch, afforded the jury some ground to infer that the conductor knew its speed would be accelerated as soon as the switch had been thrown; and if he knew this, and insisted upon plaintiff's alighting, even without resorting to compulsion of any kind, we are not prepared to say but that the jury might have drawn a conclusion of recklessness of consequences from such conduct which would have supported the complaint so far as the acts of the conductor are involved in its averments.

So that our conclusion is, that there was evidence tending to sustain the case made by the complaint, and the general charge, as well as the charge which proceeded on the theory that there was a fatal variance between the allegations and proof, were properly refused. On the other hand, the jury might have found that the conductor was guilty of negligence only. Hence charge 7, requested by the defendant, which denied liability for any acts of mere negligence on the part of defendant's employees, was not abstract, and, under the authorities we have quoted, should have been given. Charge 4, requested by defendant, asserts the law correctly—that no recovery could be had for the negligence of the engineer in causing the train to make a sudden "jerk"; but it was abstract, in that there was no evidence in the case of either willfulness or negligence on the part of the engineer; and for this reason the giving of charge 3, asked for defendant, and refused, would not have involved error.

Whether plaintiff was guilty of contributory negligence was not, and could not have been under the averments of the complaint, a material issue in this case. *A. G. S. R.R. Co. v. Frazier*, 93 Ala. 45. The charge given for plaintiff and charge 1 refused to defendant were, therefore, mere abstractions. That given, however, is a correct exposition of the law, and that refused is not. Whether it is negligence in a passenger to step off a moving train at the invitation of the conductor, depends upon the further inquiry as to whether the train is going at such speed as to render the attempt obviously hazardous, and is a question for the jury under such evidence as is presented here. *S. & N. A. R.R. Co. v. Schaufler*, 75 Ala. 136; *M. & E. R.R. Co. v. Stewart*, 8 So. Rep. 708; S. C., 91 Ala. 421.

Charge 5 asked by the defendant was properly refused. It is abstract. There was no evidence that defendant had stopped or intended to stop the train between avenues D and E, in violation of the city ordinance. Moreover, the plaintiff's right would not be affected by such violation had it been committed, if she attempted to get off at that point at the invitation of the conductor; and more especially so, if her attempt was coerced by him. *N. Birm. St. R'y Co. v. Calderwood*, 89 Ala. 247, 255.

The judgment of the City Court is reversed, and the cause remanded.

CALDERWOOD v. NORTH BIRMINGHAM STREET RAILWAY CO. (1)

Supreme Court, Alabama, November, 1891.

[Reported in 96 Ala. 318.]

INJURY TO PASSENGER WHILE ATTEMPTING TO ALIGHT FROM A STREET CAR IN MOTION.—In an action against a street railroad company for injuries, the plaintiff cannot recover where the injuries were received in attempting to get off a car, while it was moving in violation of a rule of the company, and it appeared that none of the employees did or said anything to cause her to take the rash step.

The court properly charged: "If the jury believe the evidence, they must find for the defendant."

APPEAL from the City Court of Birmingham.

Action by Mrs. Martha N. Calderwood against the appellee, a domestic corporation, to recover damages for personal injuries sustained by plaintiff in attempting to alight from one of the defendant's cars, at the intersection of First Avenue and Twentieth Street, in the city of Birmingham. See 89 Ala. 247, 2 Am. Neg. Cas. 43. On the last trial, as shown by the bill of exceptions in the present record, the plaintiff testified: "I was about midway of the car when I arose to get off. I don't know how fast it was moving when I stepped off, but fast enough to throw me." On this trial, the defendant again proved the city ordinance, the rules of the company and the notice to passengers, as set out in the former report. Plaintiff excepted to the giving of the following written charge, requested by the defendant: "If the jury believe the evidence, they must find for the defendant." Judgment was rendered on a verdict for defendant. Plaintiff appealed.

A. Y. HARPER, R. G. COBB, and CABANISS & WEAKLEY, for appellant.

GARRETT & UNDERWOOD, for appellee.

Stone, Ch. J.—Pending the trial, and after all the testimony was in, plaintiff was permitted to add a new count to her complaint, against the objection of defendant. To the new count thus added defendant pleaded the statute of limitations. The

1. See also N. B. etc. R. Co. v. Calderwood, 89 Ala. 247, 2 Am. Neg. Cas. 43.

record does not show what issue, if any, was taken on this plea, and no ruling upon it is presented for revision by us; we will, therefore, give it no consideration, further than to remark there was probably no merit in the plea of the statute of limitations. *Crim v. Crawford*, 29 Ala. 626; *Mohr v. Lemle*, 69 Ala. 180. We decide nothing, however, in reference to the statute of limitations, as it is not shown to have cut any figure in the trial court.

Mrs. Calderwood suffered the injury she complained of at a street crossing. The testimony of herself and her sister states the circumstances of the occurrence more favorably to her than that of any other witness. Giving the largest interpretation to their testimony, it falls short of showing any right of action in her. She attempted to get off the car while it was in motion, and while it was crossing another public street. She was in the actual violation of all the rules of the company, and there is not a semblance of proof that any of the employees of the dummy line did or said anything to cause her to take the rash step which led to her injury. She must be held to have been the sole author of her own injury, and must bear the consequences. The City Court did not err in the charge given. *North Birm. St. Ry Co. v. Calderwood*, 89 Ala. 247.

Affirmed.

GADSDEN & ATTALLA UNION RAILWAY CO. v. CAUSLER.

Supreme Court, Alabama, November, 1892.

[Reported in 97 Ala. 235.]

RIDING ON THE PLATFORM NOT THE PROXIMATE CAUSE OF THE INJURY.—The fact that a passenger had been riding on the platform of a car contrary to a regulation of the railway company is not the proximate cause of injuries sustained from backing the train after he had alighted.

INVITATION TO LEAVE A TRAIN MAY BE INFERRED FROM CIRCUMSTANCES.—When a train of cars on a dummy line does not stop at a crossing where a passenger is in the habit of alighting, but comes to a full stop at the next crossing, and no notice is given that the train is to be backed, the question whether this was an implied invitation for him to get off there was properly left to the jury.

ERRONEOUS CHARGE AS TO THE HIGHEST DEGREE OF SKILL REQUIRED.—The law requires the highest degree of care, diligence

and skill by those engaged in the carriage of passengers by railroads, but a charge that it must be exercised by men of extraordinary care, skill and diligence is erroneous.

APPEAL from the City Court of Gadsden.

Action by Thomas H. Causler against the Gadsden & Attalla Union Railway Company to recover damages for personal injuries. The second charge appears in the opinion. Two others to which exceptions were also taken are as follows: "The court charges the jury that prohibiting passengers from riding on the platform of trains is a reasonable regulation; and if Causler violated that regulation, and rode on the platform, and without such riding on the platform Causler would not have been injured, then in that event Causler cannot recover in this action." "The court charges the jury that if they believe from the evidence that Causler dismounted from the train as soon as it stopped, and that nobody connected with the train saw his peril in time to avoid it or could have seen it by due diligence in time to avoid it, then and in that event Causler would not be entitled to recover in this case if his dismounting from the train proximately contributed to produce the injury of which he complains."

DORTCH & MARTIN, for appellant.

W. H. DENSON, for appellee.

Stone, Ch. J.—We do not think the fact that Causler, the plaintiff, had been riding on the platform of the car should exert any influence in the consideration of this case, for several reasons: First. He had left the platform and was standing on the ground when the train was backed which caused the injury. The injury was not at all dependent on the place from which he had come. Second. Although his being on the platform was one of the attending conditions, without which he probably would not have been able to leave the train during its very short stop, yet there was no causal connection, as the law defines that term, between his violation of the company's rule in so riding and the injury inflicted upon him. We have recently considered this question so fully that we need not repeat the argument or reproduce the authorities. *West. Ry of Ala. v. Mutch*, 11 So. Rep. 894; S. C., 97 Ala. 194; *Beach Contrib. Neg.* §§ 33, 34. This renders it unnecessary for us to consider charges given or refused involving the doctrine of contributory negligence, and relieves us of the dis-

cussion of charges 5 and 7, given at the instance of plaintiff, and charges 1, 2, 3 and 6, asked by defendant. They were abstract, and there was nothing in those given that could prejudice defendant.

We discover little or no conflict or controversy in the testimony in this case. The plaintiff was in the habit of riding out on the dummy train, and of alighting from it at a certain crossing. Those in charge of the train had notice of his intention to leave the train at that crossing. The train was driven past the crossing without stopping; but when approaching the next crossing, only 175 or 200 yards distant, it was brought to a full stop. Nothing was said of any intention to back the train to plaintiff's customary crossing. Plaintiff had previously gotten off the train at the point at which it was now stopped, and the ground at that place was level and smooth. The plaintiff stepped off the train, and while in the act of reaching back to the platform for his crutches (he was a cripple), the train, without signal or warning, was moved backwards, knocking him down and inflicting the injury for which he sues. The question for our consideration is, were these circumstances sufficient to be submitted to the jury, on the inquiry of negligence in those having control of the train?

When a train is brought to a full stop at one's stopping place, or near to it, having passed it, it is not customary or expected that the passenger will be notified that this is his place of getting off. The circumstances, if nothing is said or done to the contrary, are sometimes an invitation to alight. And if from the circumstances, in the absence of notice or warning to the contrary, he reasonably concludes that the train has been stopped that he may alight, he is certainly not guilty of negligence in acting on this apparent invitation. *Cockle v. London & S. E. R'y Co.*, L. R. 5 C. P. 457; 7 *Ib.* 322 (1); *Ill. Cen. RR. Co. v. Able*, 59 *Ill.* 131;

1. *Cockle v. London & S. E. R'y Co.*, L. R. 5 C. P. 457 (Court of Common Pleas, Easter Term, 1870) was an action for damages sustained by reason of defendant's negligence. The plaintiff was a passenger on defendant's train, and upon reaching his station opened the door of his compartment and stepped out. Owing to the irregular outline of the

platform, a space of four feet intervened between the coach and the said platform; plaintiff fell and received the injuries complained of. There were no lights where the plaintiff attempted to alight, and it appeared that the engineer was at fault in not drawing the train up to a spot where it would have been safe to alight. Plaintiff had a verdict. *Held* (by an

Milliman *v.* N. Y. Cent. etc. R.R. Co., 66 N. Y. 642; Cartwright *v.* Chic. & G. T. R'y Co., 52 Mich. 600; Curtis *v.* D. & M. R.R. Co., 27 Wisc. 158; Highland Av. & B. Co. *v.* Burt, 9 So. Rep. 410; 92 Ala. 291; Birm. Un. R'y Co. *v.* Smith, 90 Ala. 60; Duame *v.* N. W. R'y Co., 7 Am. St. Rep. 879.

We hold that the circumstances were sufficient to authorize their submission to the jury; and that charges 1 and 4, given at the instance of plaintiff, were authorized by the testimony, and correctly stated the rules of law to be observed in its consideration.

Charge 2, given at the instance of plaintiff, raises the question of the proper measure of diligence due to passengers from a common carrier for hire. Its language is, "That the defendant is liable in damages to the plaintiff, for any injury resulting to plaintiff that occurred because defendant's agents failed to take all such precautions to avoid the injury as would be suggested by the highest degree of care, skill, and diligence, by men of extraordinary care, skill and diligence in carrying passengers by dummy line railways. And if the jury believe from the evidence in this case that plaintiff was injured while getting off defendant's dummy line railway because of the want of defendant's agents taking all such precautions to avoid the injury as would be suggested by the highest degree of care, skill, and diligence, by men of extraordinary care, skill and prudence in transporting passengers, then in such case the defendant is liable."

The measure of care, skill and diligence required to be observed by common carriers in the transportation of their passengers has been very often considered and discussed by courts of last resort, and the tendency of modern adjudication has been to make the rule more exacting. This, no doubt, is mainly attributable to the fact, that steam has come to be almost exclusively the motive power employed in the transportation of passengers. The prin-

evenly divided court), that there was sufficient evidence to go to the jury, and to justify the latter in finding a verdict for the plaintiff.

On appeal (Easter Term, 1872) it was *held*, that there was enough evidence to go to the jury. *Held*, also, that, when a railway car is brought to a standstill at a point where it is

unsafe for a passenger to alight, under circumstances that would lead a passenger to believe that he might safely alight, it is negligence on the part of the railroad company, that would make it liable in the absence of contributory negligence on the part of the passenger. L. R. 7 C. P. 322.

ciple is not always stated in precisely the same terms. Wood, in his excellent treatise on Railway Law, Vol. 2, § 301, says: "The highest degree of reasonable care is required from railway companies in the carrying of passengers, and all the appliances employed therein. By this it is not meant that they are required to exercise superhuman care and vigilance, or the utmost care, but such care, in view of the circumstances, as a reasonably prudent man would exercise, in view of the consequences likely to ensue from a relaxation of such care and vigilance." In section 313 the same author employs this language: "The law impliedly raises a contract on its (the carrier's) part to carry such person safely, so far as human foresight reasonably exercised can guard against disaster."

In Thompson, Carriers of Passengers, 123, the principle is thus stated: "Carriers of passengers for hire are bound to use the utmost care and diligence . . . in order to prevent those injuries which human care and foresight can guard against." See, also, 2 Redf. on Rail. § 192.

In 2 Wait, Act. & Def. 63, is this language: "He (the carrier) is bound to use the utmost care, which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient and suitable vehicles or vessels and other necessary or appropriate instruments and means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatsoever source arising, which may naturally and according to the usual course of things be expected to occur."

Patterson, Acc. Rail. Law, 199 to 203, and 2 Am. & Eng. Encyc. of Law, 739, do not appear to have attempted to give an explanation or specific definition of the nature and requirements of the rule.

This subject has been frequently before this court. In *M. & E. R'y Co. v. Mallette*, 92 Ala. 209, the trial court had charged the jury that "the law required the highest degree of care, diligence and skill, by those engaged in the carriage of passengers by railroads, known to careful, diligent and skillful persons engaged in such business." We fully approve this charge, and announced that it was "the universal doctrine of the courts and text-writers." We quoted very many authorities in support of it, and among

them *L. & N. R.R. Co. v. Jones*, 83 Ala. 376, and *Ga. Pac. R'y Co. v. Love*, 91 Ala. 432. In *Jones'* case we held that a railroad company is liable for injuries done to a passenger, if diligence and a careful observance of duty could have prevented them. See, also, *Leach v. Bush*, 57 Ala. 145, and *S. & N. R.R. Co. v. Bees*, 82 Ala. 340. So, in *Ala. G. S. R.R. Co. v. Hill*, 93 Ala. 514, the doctrine of *Mallette's* case was reaffirmed.

We adhere to the principle so often stated by this court, and hold, that only skillful and reasonably prudent persons should be placed in control of, or in responsible positions on trains which transport passengers for hire, and that the highest degree of care and diligence is exacted of them in the performance of their several duties and functions. The slightest negligence on their part causing injury to a passenger will render the railroad company liable. *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Tanner v. L. & N. R.R. Co.*, 60 Ala. 621.

Is there a material difference between the rule we have declared and that announced in the charge we are criticising?

It is certainly true, as announced in the charge, that the dummy line would be liable, if the injury occurred in consequence of a failure of the agents, or any one of them, having charge of the train, to exercise the highest degree of care and diligence. That, we have seen, is the measure required; and anything short of it is negligence. If the charge had stopped there, it would have been free from error. But it did not stop there. It not only required that the agent in the discharge of his duties should exercise the highest degree of care, skill and diligence, but should exercise it as it should be suggested "by men of extraordinary care, skill and diligence," as expressed in one place; while in the other, the word "prudence" is substituted for the word diligence. Now, the agent in control of the train must necessarily act on his own judgment, prudence, skill and experience, in view of the attendant circumstances. He suggests his own action; and if he be required to exercise "the highest degree of care, skill and diligence" which would be suggested or exercised "by men of extraordinary care, skill and diligence," then he must necessarily be endowed with that "extraordinary care, skill and diligence" or "prudence" which the charge exacts. This would be to require a much higher standard of qualifications for employment

on railroads than the rule we have quoted and approved exacts. Extraordinary is a strong word. In the sense in which it is used it means "exceeding the common degree or measure; hence, remarkable, uncommon, rare, wonderful." It is a much stronger word than prudent, or ordinarily prudent; and if we approve this charge, do we not necessarily declare that only men of extraordinary care, skill and prudence are eligible to the positions of engineers and conductors on railroads? This would be to establish a precedent, not only wrong in itself, but calculated to give us great trouble. This charge should not have been given.

Reversed and remanded.

LOUISVILLE & NASHVILLE RAILROAD CO. v. LEE.

Supreme Court, Alabama, November, 1892.

[Reported in 97 Ala. 325.]

CONTRIBUTORY NEGLIGENCE IN JUMPING FROM MOVING TRAIN.—An action for injuries by a passenger who, being feeble, did not have time to get off the train while it stopped at her station, jumps from such train after it begins to move, without any warning to the conductor or other employee that she had not had time to alight, cannot be maintained, because of the contributory negligence of the passenger.

APPEAL from Escambia Circuit Court.

Action by Nancy C. Lee against the Louisville & Nashville Railroad Company, to recover damages for personal injuries, caused by alleged negligence on the part of the defendant. Among the charges requested by the defendant was the general affirmative charge in its favor.

J. M. FALKNER and CHARLES P. JONES, for appellant, cited: R.R. Co. v. Smith, 92 Ala. 237; 30 Am. & Eng. R.R. Cas. 612; 28 Ib. 220; Strauss v. R.R., 86 Mo. 170; Central R.R. v. Letcher, 69 Ala. 106; Glass v. M. & C. R.R., 94 Ala. 581.

J. M. STEVENS and J. M. DAVISON, for appellee, cited: R.R. v. Miles, 88 Ala. 256; R.R. v. Stewart, 91 Ala. 421; 2 Am. & Eng. Encyc. 262; 4 Ib. 17; L. & N. R.R. v. Kelsey, 89 Ala. 287.

Haralson, J.—The plaintiff's own evidence establishes her contributory negligence to the injury she received.

Without any warning to the conductor or other employee of the railroad company, that she had not gotten off the train, at her destination, and had not had time to do so, she attempted and did alight because, as she said, "she did not want to be carried by Brewton"—at a time when she did not know, as she admits, how fast the train was moving, but when, it seems, it was fast enough to do her the damage of which she complains. Common prudence would have dictated to her to remain aboard, after the train had been put in motion. If the conductor was at fault, as she complains he was, in not having tarried long enough for her, being reasonably diligent, to get off, he was legally bound at her request, to stop, return and put her off, or in default, the company would have been responsible to her for the damage it did her. When she attempted, therefore, to alight, under the circumstances detailed by her, she herself took the risk of the peril involved in the venture. She, better than anyone else, saw how fast the train was running at the time (for no one saw her get off, so far as it appears); and, better than any other person, she knew whether, in her enfeebled condition, she could make the leap; and, without reference to the negligence of the railroad company, admitting it was guilty of some fault, she cannot be allowed to recover for injuries unintentionally and not wantonly done her by the company, which her own reckless negligence contributed immediately to bring upon her. *Central R.R. & B. Co. v. Letcher*, 69 Ala. 106; *Birm. Un. R'y Co. v. Smith*, 90 Ala. 63; *S. & N. Ala. R.R. Co. v. Schaufler*, 75 Ala. 136.

The general affirmative charge, in favor of defendant, should have been given, and the motion for a new trial granted.

Reversed and remanded.

EAST TENNESSEE & GEORGIA RAILWAY CO. v. HOLMES.

Supreme Court, Alabama, November, 1892.

[Reported in 97 Ala. 332.]

PASSENGER ALIGHTING FROM MOVING TRAIN—WHEN GUILTY OF CONTRIBUTORY NEGLIGENCE.—A passenger is guilty of contributory negligence and cannot recover damages for injuries who, being acquainted with the location, stepped from a moving train in the night-

time, because the porter had called out the name of the station and the train had stopped, but immediately proceeded, and the circumstances and indications were such as would show to any person of reasonable prudence and ordinary observation that it had not reached the proper stopping place.

A PERSON HAS NO RIGHT TO LEAP FROM A MOVING TRAIN.—

No one has the right to leap from a moving train because he is being carried beyond his destination. His duty is to remain aboard and demand redress for the injury that may have been done to him.

APPEAL from Talladega Circuit Court.

Action by Jacob R. Holmes against the East Tennessee, Virginia and Georgia R'y Co. to recover damages for injuries caused by the alleged negligence of defendant.

KNOX & BOWIE, for appellant, cited; *Smith v. R.R. Co.*, 88 Ala. 538; *R.R. Co. v. Smith*, 92 Ala. 237; *Mitchell v. R.R. Co.*, 51 Mich. 236; *Downey v. Hendrie*, 8 Am. & Eng. R.R. Cas. 386; *R.R. v. Schaufler*, 75 Ala. 136; *Lillie v. Fletcher*, 81 Ala. 234; *A. G. S. R.R. v. Hawk*, 72 Ala. 112; *Woodward v. Jones*, 80 Ala. 123.

CECIL BROWNE, for appellee, cited: *Lent v. R.R. Co.*, 120 N. Y. 467; 18 Am. & Eng. R.R. Cas. 179; *R.R. v. Miles*, 88 Ala. 256; *R.R. v. Stewart*, 91 Ala. 423.

Haralson, J.—This suit is for damages, brought by the appellee, who was a passenger on the railroad train of the appellant, having paid his fare from Talladega to Childersburg, two stations on said railroad. The complaint charges, that when the train arrived at or near the town of Childersburg, it was stopped at a point on said railroad about one hundred and fifty yards from defendant's depot, and the plaintiff was then and there *ordered and commanded* by the servant or agent of the defendant, whose duty it was to notify passengers when and where to leave the cars, to leave the one in which he was riding; and thereupon plaintiff quit his seat and proceeded to the rear steps of the car, and just as he had gotten on the steps, and was in the act of leaving, and before he had time to get off, the car was suddenly started, thereby causing him to fall and be thrown into a ditch, whereby he was injured; and it is averred that his injuries were caused by the carelessness of the servants of the defendant, in not affording plaintiff a reasonable opportunity, and by his being *instructed and*

commanded to leave the car when there were no facilities for leaving it, and by said car being started before he had an opportunity to get off.

The gravamen of the complaint, as is manifest, is in the alleged forcible ejection of the plaintiff from the train, at a place and time when no opportunities were afforded him for departing with safety. The language employed is emphatic—"ordered and commanded," "instructed and commanded," to leave. One thus treated must be held to have been forced against his will to depart. It implies that force might have been used to cause him to leave if he had not obeyed; and obedience, under such circumstances, must be held to have been forced.

There was a demurrer to the complaint which was properly overruled, and thereupon defendant pleaded not guilty and contributory negligence on the part of the plaintiff.

If this case were tried on the general issue, without reference to the plea of contributory negligence, as we said in a similar case, "the first inquiry would be as to whether the agent of the defendant was guilty of any tort, wrongful act or negligence which resulted in the injury to plaintiff. If there was no wrongful act of omission or commission, such as constitutes a violation of legal duty on the part of the defendant, or its agents, no recovery of damages by plaintiff could be had, whatever may have been the extent of his injuries. "So, if it were shown that the defendant, or its servants, were guilty of such wrongful act, but that this act had no legal connection with the injury received, so as to have operated to produce it, as a natural and proximate consequence, there could be no liability cast on the defendant." If, however, as we further held, "the defendant or its servants were guilty of some wrong or negligence, the question then is, 1. Whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant or its servants; or, 2. Whether the plaintiff, by his own negligence or want of ordinary care and prudence, has so far contributed to his own misfortune, that but for his contributory negligence the injury complained of would not have happened." *South & North Ala. R.R. Co. v. Schaufler*, 75 Ala. 141.

Tried on the plea of not guilty, there is such a disagreement between the allegations of the complaint and the proof, as the

evidence of the plaintiff himself and that of his brother, examined in his behalf, will show, as would not entitle the plaintiff to recover.

At Childersburg there is a railroad crossing, that of the defendant's road and the Columbus & Western Railroad. The depot of the latter road is about fifty or seventy-five yards from the crossing, and that of the defendant about seventy-five or one hundred yards from the same point. A long platform extended from the Columbus & Western depot to the crossing, and one from that point to the depot of the defendant, the two forming, as described, about a right-angle triangle.

It is well to state, just here, that it is provided by statute, "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within one hundred feet of such crossing, and not to proceed until they know the way to be clear." Code, § 1145.

The train, as the evidence shows, consisted of seven cars, including the engine and tender, and was about one hundred yards long, and the plaintiff was traveling in the rear coach. The evidence also showed, without conflict, that the train stopped near the crossing, as required by the statute, but only for a moment, and stopped its usual length of time at the depot of defendant, just below the crossing, seventy-five or one hundred yards.

To sustain his complaint, and in giving his account of the transaction, the plaintiff testified, that the train blew for Childersburg about a half-mile before reaching the station; that the young man in the employ of the company, calling out the stations, cried out, "Childersburg." In a short while afterwards, but he does not tell how long the train stopped, and just a little while before it stopped, the same man cried out, "All out for Childersburg." That when the whistle blew, this porter, who was sitting immediately in front and to the left of plaintiff, announced "Childersburg," and picked up his lantern, and, after walking a few steps towards the front door of the coach, called out, "All out for Childersburg," and arriving at the front door, opened it, and again called out "Childersburg," "All out for Childersburg," and closed the door, went out on the platform of the car, and just then the

train came to a full stop; that plaintiff and his brother were sitting about ten feet from the rear end of the car, and when the train stopped, they picked up their baggage and walked to the rear of the coach, his brother being in front; that the brother walked out, to get off, but he didn't see him get off, and didn't know what had happened to him till afterwards; that when plaintiff reached the rear door of the car, the train was starting, or in motion, and as he reached the steps of the car he discovered the speed of the train was increasing, but he could not tell how fast it was going, but it seemed to be moving slowly, and it was too dark for him to discover it was moving at a dangerous rate of speed; that there were no lights on the outside; he could see the surface beneath him, but it was too dark for him to discover whether what he saw was the ground or the platform; that when he stepped from the train he fell on the platform, about ten feet below the crossing; that he did not see any officer or the said porter of the company at the time he left the train, nor did any officer or employee of defendant, or any other person, speak to him and tell him to get off at the place he did, nor did any other passengers get off at the same place; that plaintiff had been in Childersburg several times before, had come there that morning on the Columbus & Western road, and gone up on defendant's road to Talladega, and had traveled over the Columbus & Western to Childersburg about a month before, and when he left the train he did not know he had not arrived at the station at Childersburg.

The plaintiff's brother testified, in his behalf, substantially as plaintiff did, that when he reached and went out of the rear door of the car, the train had started; that he could see he was stepping on the ground, but couldn't tell how far the ground was below him; that he stepped off the train about ten yards above and from the crossing.

There was no evidence that the porter knew the plaintiff, or where he was going, or where he desired to get off, or that he had gotten off.

Taking these statements of the plaintiff as true, in which he represents the porter as giving a greater number of notifications of the arrival or approach of the train at Childersburg than is usual, judging from our own experience and observation, and

which, no doubt, without impugning his veracity, are colored with some degree of extravagance, how can it be said, in fairness, as it is averred in the complaint, that plaintiff was "instructed," "ordered," "commanded," to leave the train when he had no facilities for doing so? The words used can be construed as implying, in the intention of the porter, nothing more than a notification of the approach of the train to Childersburg, or of its arrival at that point. As we said of words of similar import in the *Schaufler* case, they are not susceptible of a construction which would impute to him any purpose to force or compel the plaintiff to prematurely alight from the train, or to put himself in the slightest peril in leaving it, and there was, for this reason, the variance between the allegations of the complaint and the proof of which we have spoken. The substance of the issue is unsupported by the evidence in the record.

But, if tried on the plea of contributory negligence, in pleading which the defendant admits itself to be guilty of some negligence, the case is in no better condition for plaintiff.

If it be admitted that the language employed by the porter is such as is deposed to by plaintiff, but denied by the porter and that the plaintiff might have reasonably concluded therefrom that the train had arrived at the station at which he was to depart, and justified him in an attempt to get off, still such a conclusion could not be lawfully indulged by him, if the circumstances and indications were such as would show, to any person of reasonable prudence and ordinary observation, that it had not reached the proper stopping place. Such was our ruling in *Smith v. Ga. Pac. R'y Co.*, 88 Ala. 538, and repeated in *Rich. & D. R.R. Co. v. Smith*, 92 Ala. 237.

Surely the circumstances and indications were not such as reasonably to induce him to believe that the train was at the station when it halted but for a moment at the crossing. There were no lights, no depot building or any other landmark, to indicate a station. He was acquainted with the location, and knew of the crossing, and there was the absence of every physical fact to suggest that the train had reached the station.

Now, what are the facts to show contributory negligence on the part of the plaintiff? When the train stopped for the crossing, the rear of the car in which plaintiff rode was three hundred feet,

or one hundred yards, from the crossing. Even if by a great stretch of indulgence it be allowed he was justified in concluding that it had arrived at the station, the fact remains, that it had been put in motion before the brother of plaintiff, or plaintiff, attempted to alight. When the brother fell, it was within ten yards, or thirty feet, of the crossing, showing that the rear of the coach in which they were riding had traveled at least two hundred and seventy feet before the brother struck the ground, thirty feet before the crossing was reached, and three hundred and ten feet before plaintiff leaped off, ten feet after the platform, at the crossing, had been reached.

They each made this leap in the dark, as they seek to make it appear, and whether light enough to see or not, it was at a time when the train was going fast enough—some six or eight miles an hour, as defendant's witnesses put it—to injure both parties, breaking the arm of plaintiff when he fell. He did not know, as he confesses, whether he was alighting on the ground or on the platform, nor did he know that the train had not arrived at the station at Childersburg. He was blindly taking the chances. He saw no one when he got off, no one gave him any instructions about getting off; he got off at the rear end of the car, instead of at the door the porter had opened and passed out of, with his lantern in his hand; and he made the leap of his own accord, at great peril to his life and limb, because, as it would seem, he did not desire to be carried beyond his destination. He thus took the risk of his own reckless venture, and the defendant ought not to be made to pay for it.

There was not even the excuse of necessity for his having done so. If it had been true, as he alleges in his complaint he supposed it to be, that he was at the station, and the company gave him no opportunity to get off, and he had been carried beyond his destination, the conductor, on his demand, would have been bound to stop his train and return and put him off at the station, or the company would have been liable in damages. No one has the right to leap from a moving train, because he is being carried beyond his destination, with the expectation of claiming from the railroad company damages for any injury he may sustain. His duty is to remain aboard, and demand redress for the injury that may have been done to him.

In no aspect of the case in which we have been able to view it, can we see that the plaintiff has any right of recovery. The general charge requested by defendant ought to have been given.

Reversed and remanded.

**NORTH BIRMINGHAM RAILWAY CO. v.
LIDDICOAT (BY NEXT FRIEND).**

Supreme Court, Alabama, November, 1892.

[Reported in 99 Ala. 545.]

CUSTOM OF RAILWAY COMPANY OF RECEIVING AND DISCHARGING PASSENGERS AT A PLACE OTHER THAN A REGULAR STATION.—If a railway company is in the habit of receiving or discharging passengers at a place other than a regular station, and the custom is known to a passenger who attempts to board a train at such a place, he is as much justified in the assumption that the company's cars are in a safe condition as he would be were he attempting to board them at a regular station.

AVERMENT NECESSARY IN COMPLAINT THAT PLAINTIFF WAS A PASSENGER.—In an action against a railway company for injuries sustained by plaintiff in attempting to board a train by reason of one of the handles of the car giving way, it is necessary to aver in the complaint that he was in some manner accepted as a passenger.

It is not negligence *per se* for a person to attempt to board a moving train.

APPEAL from the City Court of Birmingham.

Action brought by the appellee, William Liddicoat, by his next friend, against the North Birmingham Railway Company, to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence. The facts are sufficiently stated in the opinion.

Defendant interposed a demurrer to the complaint upon the following grounds: 1. Because it does not allege that the defendant's train was at a station or regular stopping place, where passengers were received and discharged, when the plaintiff attempted to get aboard the train. 2. Because it does not allege that the defendant or its servants knew or could have known that William Liddicoat was attempting to get aboard the train when he received the injuries complained of. 3. Because the complaint shows that plaintiff was guilty of contributory negligence that was

the proximate cause of the injuries complained of by him, and does not allege that the defendant was guilty of wanton or intentional negligence. The court overruled each of these grounds of demurrer, and the defendant duly excepted thereto. There was judgment for plaintiff, and defendant appeals.

GARRET & UNDERWOOD, for appellant, cited: *N. B. St. R'y Co. v. Calderwood*, 89 Ala. 247; *M. & C. R.R. Co. v. Womack*, 84 Ala. 150; *Ga. Pac. R.R. Co. v. Blanton*, 84 Ala. 154.

CHAS. P. JONES and W. R. HOUGHTON, for appellee, cited: *L. & N. R.R. Co. v. Johnston*, 79 Ala. 436; *A. G. S. R.R. Co. v. Sellers*, 93 Ala. 9; *B. & O. R.R. Co. v. Kane*, 69 Md. 111.

Stone, Ch. J.—Appellee, a minor between eleven and twelve years of age, sued appellant, a street railway company, operating cars with dummy engines, to recover damages for alleged injuries sustained by plaintiff while attempting to board one of appellant's trains. The train he attempted to board was going from the city of Birmingham to North Birmingham, and was approaching a point where the Birmingham Mineral Railroad Company's tracks cross appellant's tracks, when it came to a stop just before reaching the crossing, and then proceeded on its way. Appellant has passenger stations at short intervals along its road, one of which is located about two hundred feet north of the intersection of the two roads, but it has no station at the point where appellee attempted to enter its car. It was, however, a common if not daily occurrence for persons to take advantage of the momentary stoppage of the train, as it approached the crossing, to board or alight from its cars, and it does not appear that this practice was ever prohibited or objected to by appellant, or its servants in charge of its trains. The habitual stopping of the train at this point was in consequence of the requirements of the statute (Code, § 1145), and not for receiving and discharging passengers, though that had become a frequent if not daily occurrence, as stated above.

On the 23d of March, 1891, appellee was standing on the side of appellant's track, either upon or near the roadway of the intersecting road, when appellant's train, consisting of an engine and two cars, approached the crossing, going north. One of the cars was an ordinary passenger coach, and the other an open car having running boards extending along each side, which furnished a step to passengers getting on or off the car. Appellee attempted

to board one of the cars but fell, and one of the trucks passed over and crushed his leg, necessitating amputation. For that injury this suit was brought.

Whether appellee, when he attempted to board the train, was standing on the track of the intersecting road and attempted to get on the car while the train was in motion, or whether he was south of the crossing and the train at rest when he made the attempt, are questions as to which the testimony is conflicting. There is also direct conflict in the testimony as to the cause of appellee's fall. His statement is, that he undertook to board the open car while the train was at rest, south of the crossing, the open car being next to the engine; that he stepped on the running board and seized with his hand the arm or support attached to the car to assist passengers in getting in and out of the car; that one end of the arm or support broke loose from its fastenings and precipitated him upon the track.

The engineer, on the other hand, testified, that he was looking at appellee when the accident occurred; that he saw him, as the train was passing, standing on the roadway of the Birmingham Mineral Railroad Company at its intersection with appellant's road, and that the box passenger coach being next the engine, appellee jumped on the rear steps of that car and seized hold of the railings; that he lost his hold and fell on the track and the front truck of the rear car passed over his leg; that the railing of which he took hold did not break loose, and was not out of repair. There is other testimony seemingly corroborative of each of these versions of the accident.

The averments of the complaint, so far as material to be noticed, are that "on the day and year aforesaid, at a point in North Birmingham on defendant's line of road a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad, the plaintiff boarded, or attempted to board, or attempted to, and was in the act of getting on one of the defendant's passenger cars, as a passenger, as he had the right to do; that the car the plaintiff was attempting to get on was an open car with a running board on each side for passengers to get on and into the car; that on each of the seats of said car was a handle or arm made and used for the purpose of enabling passengers to catch hold of the same to enable them to pull themselves into the car; that plaintiff

caught hold of one of these handles or arms and was pulling himself into the car, when the handle or arm turned or broke, whereby plaintiff was thrown to the ground and under the car, and his leg was run over," etc.

There was a demurrer to the complaint which was overruled. The defendant then pleaded the general issue and contributory negligence on plaintiff's part. The errors assigned are the rulings of the court on the demurrer to the complaint, on the charges given and refused, and on the motion for a new trial.

It may be declared as a general rule that the relations of carrier and passenger are founded in contract, either express or implied, made upon a valuable, but not necessarily a pecuniary consideration, "and when such relations bring one of the parties into contact with a material agency which the contract requires the other party to supply, the law exacts of him who supplies that agency the duty of exercising care in its selection, maintenance in repair and operation." 2 Am. & Eng. Encyc. of Law, p. 739. The relation begins "when the contract of carriage having been made, or the passenger having been accepted as such by the carrier, he has come upon the carrier's premises or has entered any means of conveyance provided by the carrier." 2 Am. & Eng. Encyc. of Law, p. 244.

It is the duty of the carrier to provide safe and convenient stations and means of ingress to and egress from its cars; and if a person has the *bona fide* intention of taking passage by a train and goes to a station at a reasonable time, he is entitled to protection in these respects, as a passenger, from the moment he enters the carrier's premises.

The carrier may, by proper notice, prohibit the receiving or discharging of passengers at other places than the stations provided by it, and persons attempting, uninvited, to board its trains at such other places, in the absence of wanton or willful negligence on the part of the carrier, act at their own peril until they have entered its carriage, or are accepted as passengers.

If, however, a carrier is in the habit of receiving or discharging passengers at a place other than a regular station, or persons are invited or directed by its authorized servants to board or alight from its cars at such other places, they have the right to presume that it is safe to board or quit the train at such place, unless the

risk in doing so is so obvious that a man of ordinary care and prudence would not, under like circumstances, make the attempt. *B. & O. R.R. Co. v. Kane*, 69 Md. 11.

It is immaterial for what purpose its cars are stopped at such place, other than a regular station, whether in consequence of a duty enjoined on it by law, as when approaching the track of an intersecting road, or arising from convenience or necessity in the usual mode of operating its trains. If the public are in the habit of entering or quitting its cars at such place, without objection from its agents or servants, such persons are entitled to the protection of all the duties imposed upon the carrier in receiving and discharging passengers at its regular stations, except in so far as it may be relieved therefrom by obvious risks, incident to the nature and condition of such place of customary use. The customary use of such place for receiving and discharging passengers may become so generally known and well established as to impose upon the carrier the duty of maintaining such place in as safe and convenient condition as a regular station, and to authorize a passenger, without notifying the conductor, or other servant of the carrier, of his desire or intention to board the train, to presume that a reasonable opportunity will be afforded him for that purpose, and that it is safe to do so. A passenger attempting to board a train at such place, and under such circumstances, is as much justified in the assumption that the carrier's cars are in a safe condition, as he would be were he attempting to board them at a regular station; for the duty of the carrier to so maintain them attaches in all cases and under all circumstances where the relation of carrier and passenger exists either by express contract or by implication of law.

What has been said has no application to a person who, being at either a regular station, or a place of customary use for receiving and discharging passengers, has not a *bona fide* intention of boarding a train as a passenger, but simply intends or attempts to obtain passage without the knowledge and consent of the carrier's servants or employees, and without paying fare. Such a person would in no sense be a passenger, but a trespasser to whom the carrier would owe no higher duty than to refrain from wanton or willful negligence; or, upon discovering him to be in a position of peril, to employ such reasonable care as the facilities

at hand would permit to avoid the threatened injury. *L. & N. R.R. Co. v. Webb*, 97 Ala. 308; 12 So. Rep. 374; *M. & C. R.R. Co. v. Womack*, 94 Ala. 149.

But the failure of the carrier to maintain its cars in repair would not, as respects such person, be either wanton or willful negligence, however gross such negligence might be, and for an injury resulting under such circumstances, the carrier would not be answerable in damages to the person injured.

Whether or not a person is a passenger is generally a question for the jury, and always so when different inferences may be drawn from the testimony. *Brown v. Scarboro*, 97 Ala. 316; 12 So. Rep. 289.

There is testimony in the case before us tending to show that appellee was, when injured, attempting to board one of appellant's cars with a *bona fide* intention of riding thereon, upon paying the customary fare; while, on the other hand, there is testimony tending to show that his attempt to board the train, at the time and place mentioned, was prompted by a mere boyish propensity; in common parlance, to "steal a ride," as he had done or attempted to do on other occasions; and if the testimony on another trial should be substantially as we now find it, the question will be one for the jury, under proper instructions from the court.

It cannot be affirmed as a universal proposition of law that it is negligence *per se* for a person to attempt to board a moving train. The age and physical condition of the person making the attempt, the rate of speed of the train, the nature of the car and of the place, and all the attendant facts and circumstances enter into the question, and while any one of these facts might possibly be sufficient to justify the conclusion of negligence as a matter of law, ordinarily it is a question for the jury, the test being whether a person of ordinary care and prudence would, under similar circumstances, have made the attempt. *B. & O. R.R. Co. v. Kane*, 69 Md. 11; *M. & E. R'y Co. v. Stewart*, 91 Ala. 421.

All the questions for review in this case may be solved when tested by the principles we have above formulated.

Taking up the demurrer to the complaint, and construing, as we must, the averments of the latter most strongly against the pleader, we are unable to declare that the complaint shows on its face that the relation of carrier and passenger legally existed

between appellant and appellee at the time the alleged injury was suffered. It is not averred that appellee was attempting to board the train at a station provided for passengers, or at a place where it was usual or customary to receive passengers on its cars, or that appellee was invited or knowingly permitted to attempt to board the car by any authorized servant or employee of the company, or that he was, in any manner, accepted as a passenger. In the absence of averments showing an express contract of carriage, or of facts from which contract is implied in law, no relation is shown to have subsisted between the parties at the time of the accident that devolved upon appellant the duty towards appellee of maintaining its cars in repair. Failing in this respect, and there being no averment that the injury was caused by the wanton or willful negligence of the company, no cause of action is shown for which it is answerable to appellee. *L. & N. R.R. Co. v. Hariston*, 97 Ala. 351; 12 So. Rep. 299; *Ensley R'y Co. v. Chewning*, 93 Ala. 24.

We are not unmindful of the averment in the complaint that "plaintiff was in the act of getting on one of the defendant's passenger cars *as a passenger, as he had the right to do*," but these words are the mere averment of the pleader's conclusion. No facts are stated, and no weight can be accorded them in determining the sufficiency of the complaint. They are perfectly consistent with a most heedless attempt to board the train when in motion, and at a place not set apart by any order or usage of the company for receiving passengers. Moreover, there is an almost irresistible implication that when the attempt was made to board the car the train was in motion.

There is a manifest distinction in this respect between the complaint in this case and that in *L. & N. R.R. Co. v. Jones*, 83 Ala. 377. In the latter the averment that the plaintiff's intestate was a passenger is supported by the statement that she was in the defendant's coach, a position which, of itself *prima facie*, indicated the relation of passenger; while here there is no fact averred in the complaint which indicates that appellee had become, or was in a position entitling him to become a passenger in appellant's train at the time of the accident.

When we look to the averments of fact in the complaint, as controlled by the intendments against the pleader, it must be

inferred from the complaint that appellee's attempt to board the train was at a place where he was not authorized or invited to make the attempt; that the cars were in motion at a rate of speed which would have deterred a man of ordinary care from making the attempt under like circumstances, and that in making such attempt appellee was a trespasser. *M. v. A. G. S. R.R. Co.*, 97 Ala. 305; 12 So. Rep. 170; *Ensley R'y Co. v. Chewning*, 93 Ala. 24.

It is contended in argument for appellee that it must be inferred that the train was at rest when appellee undertook to board it, because of the averment that appellee's attempt to board was made when the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad," and because of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting road.

There are conclusive reasons why this argument cannot prevail. Although the court takes judicial knowledge of the requirements of the statute, and it is averred in the complaint that appellee's train was south of the crossing, it is not averred that the train was on a north-bound trip. Indulging the view most unfavorable to the pleader, as we must, the train at the time of the accident was south-bound and, therefore, according to the complaint, had passed the intersecting road, and, consequently, the point where it was required by the statute to come to a stop.

On the other hand, if we could assume the train was north-bound, it is not averred it had approached within one hundred feet of the crossing, when the plaintiff undertook to board it, that being the distance from the crossing at which it was required by the statute to come to a full stop. The averment that the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad" is not the equivalent of an averment that the train was within one hundred feet of the crossing. This last fact is not necessarily implied in the averment made. The inference does not arise, as matter of law, from the facts averred in the complaint, that appellant's train was at rest when appellee attempted to board it, but, as we have shown, the intentions on demurrer are to the contrary.

It results from the foregoing principles that the first and second grounds of demurrer to the complaint should have been sustained;

and in view of the intendments against the pleader, as above indicated, it may be the third ground of demurrer should have been sustained, notwithstanding contributory negligence is ordinarily matter of defense. We cite the following authorities: *L. & N. R.R. Co. v. Hariston*, 97 Ala. 351; 12 So. Rep. 299; *M. v. A. G. S. R.R. Co.*, 97 Ala. 305; 12 So. Rep. 170; *Ensley R'y Co. v. Chewning*, 93 Ala. 24.

The charges given and refused by the court, on which the remaining assignments of error are based, need not be specially noticed. The principles we have announced will furnish sufficient guide on another trial.

For the error of the City Court in overruling the demurrer to the complaint, its judgment is reversed and the cause is remanded.

McLAREN v. ALABAMA MIDLAND RAILWAY COMPANY.

Supreme Court, Alabama, November, 1893.

[Reported in 100 Ala. 506.]

CONTRIBUTORY NEGLIGENCE IN BOARDING MOVING TRAIN.—

In an action for injuries by the plaintiff striking a platform while attempting to get on a train, and the evidence shows that he stood within twenty steps of the train for two minutes before it started; that the conductor called "All aboard" before it moved; that the plaintiff knew of the dangerous proximity of the platform, "but did not have the matter in his mind at that time;" that the train was moving at the rate of three or four miles per hour; that he had been warned frequently by the conductor not to board a moving train, the plaintiff is guilty of contributory negligence.

ADMISSION OR EXCLUSION OF EVIDENCE, THOUGH ERRONEOUS, CAUSES NO INJURY.—When in an action for injuries it is shown that the plaintiff was negligent, he cannot complain of error in the admission and exclusion of certain evidence which could not have affected the result.

APPEAL from the Circuit Court of Crenshaw.

Action by the appellant, J. C. McLaren, against the Alabama Midland Railway Company, to recover damages for personal injuries, which were alleged to have been inflicted by reason of the defendant's negligence. Judgment for defendant, from which

plaintiff appeals. The only assignment of error which is considered by the court is based on an exception reserved to the Circuit Court's giving the general affirmative charge for the defendant. The facts having reference to this question are sufficiently stated in the opinion.

I. H. PARKS, for the appellant, cited: *L. & N. R.R. Co. v. Hall*, 87 Ala. 709; *Holland v. Ten. Col. & Iron Co.*, 91 Ala. 444; *M. & E. R.R. Co. v. Stewart*, 91 Ala. 421; *C. R. B. Co. v. Miles*, 88 Ala. 256; *Ga. Pac. R.R. Co. v. Daniel*, 92 Ala. 300; *Watson v. E. T. V. & G. R.R. Co.*, 94 Ala. 634; *L. & N. R.R. Co. v. Perry*, 87 Ala. 392; *R. & D. R.R. Co. v. Powers*, 149 U. S. 43.

A. A. WILEY, for the appellee, cited: *Finlayson v. Chic. etc. R.R. Co.*, 1 Dill. 579; *R.R. Co. v. Jones*, 95 U. S. 439; *Bellefontaine R'y Co. v. Hunter*, 33 Ind. 335; *Pa. R.R. Co. v. Aspell*, 23 Pa. St. 147; 53 Ill. 510; 86 Ill. 467; *Marion v. Erie R'y Co.*, 56 N. Y. 302; 21 Minn. 293; *M. & E. R.R. Co. v. Stewart*, 91 Ala. 421; *Smith v. Birm. Un. R'y Co.*, 90 Ala. 60; *Central R.R. Co. v. Letcher*, 69 Ala. 106; *Thompson v. Duncan*, 76 Ala. 334; *R.R. Co. v. Hawk*, 72 Ala. 112; *R'y Co. v. Bridges*, 86 Ala. 448; *C. & W. R.R. Co. v. Bradford*, 86 Ala. 574; *M. & C. R.R. Co. v. Womack*, 84 Ala. 149; *Carrington v. L. & N. R.R. Co.*, 88 Ala. 476; *Gothard v. Ala. Gt. So. R.R. Co.*, 67 Ala. 114; *Ga. Pac. R.R. Co. v. Blanton*, 84 Ala. 154; *Shear. & Redf. Neg.* §§ 283, 476, 481, 520, 579; *Thomp. Car. of Pas.* 267; *Griswold v. Chicago*, 64 Wis. 652; *McCall v. N. Y. C. R.R. Co.*, 54 N. Y. 642; *Glendening v. Sharp*, 22 Hun 78; *Terre Haute R.R. Co. v. Clarke*, 73 Ind. 168; *Carroll v. Minn. Valley R.R. Co.*, 13 Minn. 30; *Rothe v. Mil. R.R. Co.*, 21 Wis. 256; *Kelogg v. N. Y. C. R.R. Co.*, 79 N. Y. 72; *Houston R.R. Co. v. Richards*, 59 Tex. 330; *B. & O. R.R. Co. v. Depew*, 40 Ohio S. 121; *Chic. R. I. P. R. Co. v. Clark*, 108 Ill. 113; *Blodgett v. Bartlett*, 50 Geo. (Miss.) 353; *Morrison v. Erie R'y Co.*, 56 N. Y. 302; *Burrows v. Erie R'y Co.*, 63 N. Y. 556; *Davis v. Chicago, etc. R'y Co.*, 18 Wis. 175; *Central R.R. v. Letcher*, 69 Ala. 106; *R'y Co. v. Jones*, 95 U. S. 439; *E. T. V. & Ga. R.R. Co. v. Kornegay*, 92 Ala. 228; *C. & W. R'y Co. v. Bradford*, 86 Ala. 574.

Coleman, J.—The action was to recover damages for personal injuries. There are three assignments of error, two of which relate to the ruling of the court upon the admission and

exclusion of testimony, and one to the charge of the court which directed the jury to find the issue for the defendant.

The facts show a clear case of contributory negligence on the part of the plaintiff, and the result would be the same with the evidence excluded to the introduction of which an objection was reserved, or with the evidence admitted which was excluded against the objection of the plaintiff.

The negligence complained of was the construction of a platform so near the road track, that plaintiff while upon the steps attempting to board the train as a passenger was brought violently against the edge of the platform and injured. The complaint also avers that the train did not remain at the depot a sufficient length of time to enable plaintiff to get aboard the train with safety. The evidence is without conflict, that the train gave all parties ample time to get aboard; that after plaintiff had completed the delivery of his freight for shipment, he stood talking with the witness Campbell within twenty steps of the train, on his private business, for two minutes, a longer time than was necessary for him to have safely got on the train; that the conductor gave the signal "All aboard" before the train was moved, and he had ample time then to have taken passage. True plaintiff says he is hard of hearing and did not hear the conductor, but a number of disinterested witnesses testified they heard it, including plaintiff's own witness. The witness Campbell to whom plaintiff was talking at the time heard the conductor call out "All aboard."

The space between the platform and the car was nine and three-quarter inches. The injury occurred in the open daylight. Plaintiff testified that he "had lived at the station for five years, knew of the location and construction of the platform, of the dangerous proximity of said platform to the road crossing, its nearness to trains when on the track, standing or moving, *but did not have the matter in his mind, at that time, as it was occupied with other things.*" We have italicized a part of plaintiff's evidence, as it brings his case squarely within the rule declared in Hall v. L. & N. R.R. Co., 87 Ala. 719-720. The evidence shows conclusively, and plaintiff admits it in his own testimony, that at the time he attempted to board the train it was moving forward at the rate of "two or three miles an hour or faster," while others fix the speed at five or six miles per hour. The evidence shows

conclusively that rather than enter the second car, which was convenient, or walk a few steps to where the passenger car was standing, plaintiff voluntarily preferred to wait until the car moved up to where he was standing, feeling confident that he could step safely on while it was moving forward. It seems that he had pursued this course frequently at other times, against the warning and protest of the conductor. We have no reason to doubt the truth of the statement of the witness who says that immediately after plaintiff was injured, he said: "I thought I was young and supple enough to board a moving train, but find I am mistaken; I find I am growing old." The truth of this evidence is not disputed. The danger of the attempt was obvious. The risk was assumed, voluntarily, without the knowledge of the defendant, when there was no necessity for it, but purely as a matter of preference. *R.R. Co. v. Miles*, 88 Ala. 256; *Montgomery & E. R.R. v. Stewart*, 91 Ala. 422; *Ricketts v. Bir. S. R.R. Co.*, 85 Ala. 600.

Affirmed.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILROAD COMPANY v. CANTRELL. (1)

Supreme Court, Arkansas, November, 1881.

[Reported in 37 Ark. 519.]

TRAIN SHOULD BE STOPPED OPPOSITE STATION PLATFORM.

—It is the duty of those in charge of a railroad train to stop it opposite the station platform that passengers may get off in safety.

ALIGHTING FROM MOVING CAR—WHEN NOT NEGLIGENCE.—

A passenger who gets off a train, slowly moving, by direction of the conductor or other person employed to manage the train, where the danger is not apparent, cannot be charged with negligence.

WHAT DAMAGES PLAINTIFF ENTITLED TO.—A plaintiff in an action for injuries is entitled to compensation for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expense of his sickness resulting from the injury and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession.

1. Cited in *St. L. I. M. etc. R'y Co. v. Person*, 49 Ark. 182, 2 Am. Neg. Cas. 122; *St. L. I. M. etc. R'y v. Rosenberry*, 45 Ark. 256, 2 Am. Neg. Cas. 139.

PLATFORMS AT STATION—DUTY OF RAILROAD COMPANY TO PROVIDE.—A railroad corporation is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train.

APPEAL from Clay Circuit Court.

Action by appellee against appellant for damages for a personal injury sustained through the negligence and misconduct of the defendant's train conductor in causing him to alight from the train while it was in motion. Defendant denied the negligence, and averred that the injury resulted from the plaintiff's own negligence.

The court gave the following instructions for the plaintiff:

1. "If the jury find from the evidence that the plaintiff was a passenger on defendant's train for Knoble Station, and, on arriving there, the conductor or agent called out the name of the station, and directed the plaintiff to get off said train without first stopping it, and that the platform at that station is unsafe, and of insufficient length for the safe landing of passengers, and that the plaintiff got off the train under the directions of the defendant's conductor, agent or employee, and, in doing so, was injured, on account of not stopping said train in time, or on account of such unsafe or insufficient platform, the defendant is liable."
2. "If the jury find from the evidence that the plaintiff was ordered or directed by the conductor or agent of the defendant to get off the train, he had a right to rely upon such advice or directions, provided he took no more risk in getting off the train than a prudent man would have taken under the same circumstances."
3. "If the jury find that the plaintiff took no more risk than a prudent man would under the same circumstances, he was not guilty of contributory negligence."
4. "If the jury find that the plaintiff was ordered or directed by the defendant's conductor or employees to get off the train, and told to hurry up, and such orders and directions would cause a man of ordinary reason to believe that he must leave the train, or submit to the inconvenience of being carried past the station, and that the plaintiff in getting off the train was injured, the defendant is liable; provided that they find that the act of getting off the train was a careful and prudent act, and not a rash and careless exposure to peril and hazard."
5. "If the jury find for the plaintiff they will assess his damages at a

sum that will compensate him for the bodily injury sustained, the pain suffered, the effect of the injury on his health, according to its degree and probable duration, the expense of his sickness resulting from the injury, and of attempting to effect a cure, and the pecuniary loss sustained by reason of inability to attend to his business or profession." 6. "The defendant is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train."

For the defendant the court gave the following instructions: 1. "If they find that the plaintiff could, by ordinary care and prudence, have prevented the injury, they will find for the defendant," and refused the following: 2. "If the jury find that the plaintiff's own careless and negligent conduct caused or contributed to cause the injury, they will find for the defendant."

The court, of its own motion, instructed as follows: 1. "Both the plaintiff and defendant are held to ordinary prudence." 2. "Before the jury can find for the plaintiff, on the ground that the agent or other employee of the defendant directed or advised the plaintiff to get off the train, they must find from the evidence that such directions or advice were given at a time and in a manner that would have induced the belief in the mind of a man of ordinary reason that such agent meant and intended that he should get off at the time and under the circumstances existing at the time he did get off." 3. "If the jury find that the plaintiff's own careless and negligent conduct caused or contributed to cause the injury, they will find for the defendant."

The jury having reported that they could not agree upon the amount of their verdict, the court told them that it was important to the parties that they should agree, and not let a hundred or two hundred dollars stand in the way. Finally the jury gave a verdict for plaintiff, assessing his damages at \$800.

Defendant filed a motion for a new trial, assigning as cause, among others, error of the court in its advice to the jury as to the damages, and also filed the affidavit of one of the jurors, stating that he was induced by that advice to agree to the verdict, having before such instruction been in favor of giving plaintiff only \$500. The motion was overruled. Defendant filed a bill of exceptions and appealed.

GEO. H. BENTON and DODGE & JOHNSON, for appellant, cited: *Shear. & Redf. on Neg.* §§ 25, 35, 39, 265, 277, 282, 283; *Whart. on Neg.* §§. 300, 353, 371, 626; *R'y Co. v. Hendricks*, 26 Ind. 228; *Nelson v. R.R. Co.*, 68 Mo. 593; *R'y Co. v. Whitfield*, 44 Miss. 486; *R'y Co. v. Hazzard*, 26 Ill. 384; 2 *Redf. Rail.* § 177; 16 *Gray*, 502, 507; 54 *Ill.* 133; 66 *N. C.* 499; 106 *Mass.* 464; 49 *N. Y.* 47; 23 *Penn.* 149, 150; 32 *Penn.* 296; 20 *Barb.* 282; 56 *N. Y.* 305; 44 *Ill.* 463; 28 *Ind.* 447; 24 *Wis.* 585; *Siner's case*, 3 *Exch.* 150; *Worthington v. Curd*, 15 *Ark.* 492; *State Bk. v. Williams*, 6 *Ark.* 161; *Jordan v. Foster*, 11 *Ark.* 139; *Armstead v. Brooks*, 18 *Ark.* 521; *Dickson v. Johnson*, 24 *Ark.* 251, 540.

W. R. COODY, for appellee, cited: 23 *Ark.* 51, 112; 21 *Ark.* 357; *McNutt v. Arnold*, 22 *Ark.* 477; 19 *Ark.* 534; 10 *Ark.* 428; *Gantt's Dig.* § 1971.

Harrison, J.—It was clearly the duty of those in charge of the defendant's train, upon its arrival at Knobel, to stop the same opposite the platform, that the plaintiff might get off.

On the other hand, it may, as a general proposition, be said, that it is imprudent and a want of proper care to alight from a train while it is in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. *Crissey v. Passenger Railway Co.*, 75 *Penn. St.* 83. It would not be so if the train was moving so slowly that no damage could be reasonably apprehended.

But though, in fact, it may be hazardous, a passenger who does so at the instance or direction of the conductor or other employee in the management of the train, on whose opinion or judgment in the matter he has the right to rely, and where the risk or danger was not apparent, cannot be chargeable with negligence. *Filer v. N. Y. Cent. R.R. Co.*, 49 *N. Y.* 47; *Lambeth v. N. C. R.R. Co.*, 66 *N. C.* 499; *Whart. on Neg.* § 371.

It would seem that the train, when the plaintiff attempted to jump upon the platform, was moving very slowly, as the conductor testified that after he fell it moved only fifteen or twenty feet before it stopped; and that the direct or immediate cause of the accident was that it had too far passed the platform when he leaped from the car for him to reach it.

There was no evidence that he knew that there was any risk or

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hazard in the attempt to get off, or of any want of care in him, or of any negligence on his part which contributed to the accident; but it was proved that he was told by the conductor and brakeman "to hurry and get off," the latter telling him also that they were in a hurry, and that he was urged by their impatience to make the attempt.

We can see no objection to any of the instructions the court gave the jury. Those in relation to the question of negligence are in strict accordance with the views above expressed.

That the damages assessed by the jury were excessive was not assigned as a ground of the motion for a new trial, and the appellant cannot be heard to complain of the fifth, or that in regard to the measure of the damages. It was, however, clearly correct. *Peoria Bridge Asso. v. Loomis*, 20 Ill. 235; *Ransom v. N. Y. & Erie R.R. Co.*, 15 N. Y. 415; *Sedgw. on Damages*, 699, note 2.

The court having already instructed the jury to the same effect as asked by the defendant in his second instruction, it was, for that reason, very properly refused.

As the damages are not complained of as excessive, we have no occasion to consider the objection of the defendant to the remark of the court to the jury that it was important to the parties that they should return a verdict, and they should not let one or two hundred dollars prevent them; and we will merely say, we think it was not calculated to influence the jury to the defendant's prejudice.

The affidavit of the juror should not, however, have been allowed to be filed, as the statute expressly declares that: "A juror cannot be examined to establish a ground for a new trial, except it be to establish, as a ground for a new trial, that the verdict was made by lot." *Gantt's Dig.* § 1971.

The judgment is affirmed.

MEMPHIS & LITTLE ROCK RAILWAY CO. v. STRINGFELLOW. (1)

Supreme Court, Arkansas, November, 1884.

[Reported in 44 Ark. 322.]

RAILROAD COMPANY IN HANDS OF A RECEIVER NOT LIABLE FOR NEGLIGENCE OF RECEIVER'S SERVANT.—A railroad company cannot be held liable for the negligence of the servant of the receiver who is operating the railroad. The receiver's possession is not theirs, and the company cannot control either him or his employees.

PREMATURE ANNOUNCEMENT OF STATION—WHEN NEGLIGENCE.—When a brakeman on a railway train announces a station before it is reached, and soon after the train stops, and no warning is given that the stop is a temporary one, such an announcement is an invitation to alight, and a passenger who, attempting to alight, it being a dark night, receives injuries by reason of the train starting again, may recover damages.

APPEAL from St. Francis Circuit Court.

U. M. & G. B. ROSE, for appellants, cited: 51 Mich. 236; 47 Am. Rep. 566; 12 Am. & Eng. R'y Cases, 163; 9 Q. B. 66; 7 Moak, 119; L. R. 3 Exch. 150; 23 Penn. St. 147; 1 Cent. Law J. 335; 5 J. J. Marsh, 676; 7 Wis. 219; 25 Ill. 42.

SANDERS & HUSBANDS, for appellee, cited: 17 Wall. 964; 2 Redf. on Rail. 231; 1 McQ. H. L. Cas. 748; 38 N. Y. 455; 17 Mich. 99; Whart. on Neg. §§ 379, 371, 647, 650; St. Louis, I. M. & S. R'y v. Cantrell, 37 Ark. 522; 31 Ind. 408; 7 Irish Rep. C. L. 40; L. R. 2 Exch. 248; 39 Ark. 162; 30 Ark. 399; Gantt's Dig. § 4564, subd. 4, and § 4567.

Smith, J.—In this action, brought by a passenger to recover damages for personal injuries, the railroad company and its receiver were jointly sued. The complaint alleged that at the time of the injury the road was operated under the management of E. K. Sibley, who was appointed receiver under a decree of the Circuit Court of the United States for the Eastern District of Arkansas. The answer denied negligence and averred contributory negligence in the plaintiff. The following verdict was returned: "We, the jury, find for the plaintiff and assess the dam-

1. Cited in St. L. I. M. etc. R'y Co. v. Johnson, 59 Ark. 122, 130, 2 Co. v. Rosenberry, 45 Ark. 256, 2 Am. Neg. Cas. 157.
Am. Neg. Cas. 122; St. L. & S. R.

inferred from the complaint that appellee's attempt to board the train was at a place where he was not authorized or invited to make the attempt; that the cars were in motion at a rate of speed which would have deterred a man of ordinary care from making the attempt under like circumstances, and that in making such attempt appellee was a trespasser. *M. v. A. G. S. R.R. Co.*, 97 Ala. 305; 12 So. Rep. 170; *Ensley R'y Co. v. Chewning*, 93 Ala. 24.

It is contended in argument for appellee that it must be inferred that the train was at rest when appellee undertook to board it, because of the averment that appellee's attempt to board was made when the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad," and because of the statutory requirement that trains shall be brought to a full stop before crossing the tracks of an intersecting road.

There are conclusive reasons why this argument cannot prevail. Although the court takes judicial knowledge of the requirements of the statute, and it is averred in the complaint that appellee's train was south of the crossing, it is not averred that the train was on a north-bound trip. Indulging the view most unfavorable to the pleader, as we must, the train at the time of the accident was south-bound and, therefore, according to the complaint, had passed the intersecting road, and, consequently, the point where it was required by the statute to come to a stop.

On the other hand, if we could assume the train was north-bound, it is not averred it had approached within one hundred feet of the crossing, when the plaintiff undertook to board it, that being the distance from the crossing at which it was required by the statute to come to a full stop. The averment that the train was "a short distance south of where the defendant's road crosses the Birmingham Mineral Railroad" is not the equivalent of an averment that the train was within one hundred feet of the crossing. This last fact is not necessarily implied in the averment made. The inference does not arise, as matter of law, from the facts averred in the complaint, that appellant's train was at rest when appellee attempted to board it, but, as we have shown, the intentions on demurrer are to the contrary.

It results from the foregoing principles that the first and second grounds of demurrer to the complaint should have been sustained;

and in view of the intendments against the pleader, as above indicated, it may be the third ground of demurrer should have been sustained, notwithstanding contributory negligence is ordinarily matter of defense. We cite the following authorities: *L. & N. R.R. Co. v. Hariston*, 97 Ala. 351; 12 So. Rep. 299; *M. v. A. G. S. R.R. Co.*, 97 Ala. 305; 12 So. Rep. 170; *Ensley R'y Co. v. Chewning*, 93 Ala. 24.

The charges given and refused by the court, on which the remaining assignments of error are based, need not be specially noticed. The principles we have announced will furnish sufficient guide on another trial.

For the error of the City Court in overruling the demurrer to the complaint, its judgment is reversed and the cause is remanded.

MCLAREN v. ALABAMA MIDLAND RAILWAY COMPANY.

Supreme Court, Alabama, November, 1893.

[Reported in 100 Ala. 506.]

CONTRIBUTORY NEGLIGENCE IN BOARDING MOVING TRAIN.—

In an action for injuries by the plaintiff striking a platform while attempting to get on a train, and the evidence shows that he stood within twenty steps of the train for two minutes before it started; that the conductor called "All aboard" before it moved; that the plaintiff knew of the dangerous proximity of the platform, "but did not have the matter in his mind at that time;" that the train was moving at the rate of three or four miles per hour; that he had been warned frequently by the conductor not to board a moving train, the plaintiff is guilty of contributory negligence.

ADMISSION OR EXCLUSION OF EVIDENCE, THOUGH ERRONEOUS, CAUSES NO INJURY.—When in an action for injuries it is shown that the plaintiff was negligent, he cannot complain of error in the admission and exclusion of certain evidence which could not have affected the result.

APPEAL from the Circuit Court of Crenshaw.

Action by the appellant, J. C. McLaren, against the Alabama Midland Railway Company, to recover damages for personal injuries, which were alleged to have been inflicted by reason of the defendant's negligence. Judgment for defendant, from which

action was tried before the same judge, Blackburn, at *nisi prius*, and the evidence disclosed a similar state of facts. But the case was withdrawn from the consideration of the jury. This was held to be error. No positive rule of law was laid down as to the effect to be given to calling out the name of a station, but Mr. Baron Pollock, in his opinion before the Lords, concurred in the opinion of Mr. Justice Willes in the same case in the Exchequer Chamber: "It is an announcement by the railway officers that the train is approaching, or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or under circumstances, induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight."

In *Weller v. London, etc. R'y Co.*, L. R. 9 C. P. 126 (1); S. C., 8 Moak, 441, on the approach of a train to the station, a porter called out the name of the station and the train was brought to a standstill. The plaintiff, a season-ticket holder, accustomed to stop there, stepped out of the carriage in which he was seated, and falling upon an embankment was injured. The train had overshot the platform. It was night and there was no light near the spot, and no caution was given nor anything done to intimate that the stoppage was a temporary one only, or that the train was to be backed. Brett, J., said: "I agree that to call out the name of the station before the train has come to a standstill is no evidence of negligence on the part of the company. I also agree that merely overshooting the platform is not negligence. But if the porter has called out the name of the station, and the engine-driver had overshot the station and the train has come to a standstill, the company's servants are guilty of negligence if they do

1. The facts in *Weller v. London, Brighton & South Coast R'y Co.*, L. R. 9 C. P. 126 (Court of Common Pleas, Hilary Term, 1874), are as follows: The train on which plaintiff was a passenger had arrived at the latter's destination, and he prepared to leave the train. Hearing the servant of the defendant call out the name of the station, and seeing other passengers alighting from the

next coach, plaintiff stepped out, but the train having passed the station, he fell to the embankment and was hurt. This happened at night, and at a point where there were no lights. *Held*, that these facts were sufficient to justify the jury in finding negligence on the part of defendant's servants, and that they did not constitute evidence of contributory negligence on the part of plaintiff.

not warn passengers not to alight. At all events, the jury may from the facts infer negligence."

And the best considered American cases are to the same effect. Thus in *Central R.R. Co. v. Van Horn*, 38 N. J. L. 133, Beasley, Ch. J., said: "The court would not be warranted in saying that it is not negligence to give notice of the approach to a station, and then stop the train short of such station, in the nighttime. Such a course would naturally tend to jeopard passengers, for it would induce them to believe that they had arrived at the station designated, and they would, in the ordinary course, go to the car platform. At night this must be the inevitable result. It is said, in the brief of the counsel of the defendant, that it was right to give the notice at a long distance from the depot, so that the passengers might prepare to leave the cars. This may do when the train is not to stop before it reaches the station. When a station is called, the passengers have the right to infer that the first stop of the train will be at such station."

In *Taber v. D. L. & W. R. Co.*, 71 N. Y. 489, plaintiff was a passenger on defendant's train; she had a ticket for W.; she was not familiar with that station, but knew it was the next station to C. F., and about three-fourths of a mile therefrom. The night was dark; there was no depot at W. or station light, or anything to indicate the stopping place to a person not familiar with it. She knew when the train passed C. F., and, as her evidence tended to show, after the proper interval, so as to run the distance to W., the train came to a full stop; it had, in fact, run by the station. Before reaching it the brakeman announced the station; several passengers arose to leave; plaintiff then rose from her seat near the centre of the car, walked out upon the platform, took hold of the rail, stepped down one step, and was in the act of stepping to the second, when the train with a violent jerk started back, throwing her down and off, and she was injured. In an action to recover damages, held, that it was a question for the jury, whether, in the exercise of reasonable care and prudence, defendant should not have given notice to passengers desiring to alight at the station that the train had not come to a final stop, but would back up, and that the plaintiff was justified under the circumstances in supposing she had reached her destination and in attempting to leave the car; at least that the question of contributory negli-

gence on her part was proper for the jury. See, also, *Milliman v. N. Y. Cent. etc. R.R. Co.*, 6 Th. & C. 585; s. c., 3 Abb. N. C., affirmed 56 N. Y. 585.

In the case of *The Columbus & Ind. R.R. Co. v. Farrell*, reported in 31 Ind. 408, the plaintiff was on the car of the defendant railroad. The night was dark. The conductor stopped the train and announced the name of the station, "Cumberland." Plaintiff could not see whether there was any platform or not, or where he was going to alight, but in good faith, relying on the announcement made by the conductor, stepped off in the dark into a culvert twenty feet deep, and was injured, and the Supreme Court of Indiana, in passing upon the question of contributory negligence in that case, by approving the instructions, say: "If the plaintiff did not alight from the train until it had been fully stopped, nor until the defendant's servants had announced the name of the station, or it had been announced from the proper and usual place of making such announcements, he had the right to believe that the train had reached a proper stopping place and that he could safely alight, and if he did then alight, and did so without knowing the danger of the place, and in consequence of the darkness of the night he had no reasonable opportunity of ascertaining the danger, and he was injured in so alighting, he will be entitled to a verdict."

In *Mitchell v. Chic. & G. T. R'y Co.*, 51 Mich. 236; s. c., 47 Am. Rep. 566, also relied upon by appellants, the facts of the case as stated by the court are as follows: "Just before arriving at the junction, and when the train was some 300 or 400 feet from it, the name of the station was called out by the proper person, and the cars came to a full stop, as required by law before reaching crossings. Plaintiff at once left her seat, and hurried to leave the car. It does not appear that any person employed on the train noticed her. She went down the steps where there was no platform or other convenience for landing, and just as she stepped off the cars were suddenly started again to go forward to the depot and she fell and broke her ankle." And it was held the plaintiff had no right of action.

But that case is distinguished from the present in several particulars. The accident happened during daylight, and that is a material circumstance in this class of cases. Then no announce-

ment was made or other invitation given to alight. And again, before reaching the place, the conductor notified her he would escort her to the depot of the connecting line.

To apply the principles discussed to the case in hand: It was no negligence in the receiver's servants to stop the train before crossing the track of the St. Louis & Texas road. That was only a proper precaution to prevent collision. It would, also, have been no negligence to announce the name of the station before stopping, provided passengers had been warned to keep their seats, or otherwise informed that the stop was only a temporary one. But to make the announcement without such caution was an invitation to passengers bound for that station to alight when the train came to a stop, and was a circumstance from which a jury might well infer negligence, if, in attempting to alight, an injury was received. The charge of the court and its refusal to charge were in accordance with these views.

All that is left in this case is the question of damages. The plaintiff received a severe cut upon the head, leaving a permanent scar; and the ends of his fingers on one hand were mashed off. As we stated, he lost consciousness when he fell. He was confined to his bed for four weeks and disabled from work for four months. His bill for medical attendance and medicines was between \$25 and \$35. He lost thirty pounds of flesh and suffered great physical pain, his hand having risen and become a running sore. His labor on the farm at that time of the year was worth \$25 a month.

The assessment of damages was, perhaps, somewhat too liberal to the plaintiff. Yet there can be, from the nature of the case, no exact measure of compensation for physical pain and mental anguish which is inseparable from it. Under such circumstances, appellate courts are loth to interfere merely because damages seem excessive. The jury and the trial judge, before whom the plaintiff's wounds were exhibited at the distance of nearly a year from the happening of the accident, could more justly estimate the extent of those injuries than we can possibly do from the transcript.

The judgment against the railroad company is arrested, and the judgment against the receiver is affirmed. (1)

1. There is an interesting and lengthy note to this case in 51 Am. Rep. 602.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. v. ROSENBERRY. (1)

Supreme Court, Arkansas, May Term, 1885. (2)

[Reported in 45 Ark. 256.]

ALIGHTING FROM MOVING TRAIN ON JUDGMENT OF CONDUCTOR.—Where the risk or danger of alighting from a moving train is not apparent to a passenger, and he is urged to take the hazard by the company's employees, whose duty it is to know the danger, and does so, his conduct will not be regarded as negligent. Where the danger is obvious, but slight, he has the right to rely upon the judgment of the conductor, whose duty and experience he may presume give a superior knowledge of such matters, and so justify an act which would otherwise be negligent.

LEAPING FROM TRAIN FROM FEAR OF EJECTMENT.—Where a passenger leaps from a moving train under a justifiable belief that he would be ejected if he did not go voluntarily or without force, his conduct is blameless. In such case the railroad, being the author of the original peril, would be liable for the consequences. But where there is no cause for such belief the person so leaping from train is guilty of negligence.

THE SAME—WHEN NOT NEGLIGENCE.—Where a passenger embarks on a train without attempting to learn whether it would stop at his destination or not, the railroad company is not liable for negligence because its conductor refuses to stop his train at a point forbidden by the regulations of the road.

REFUSAL TO STOP TRAIN AT PASSENGER'S STATION—EVIDENCE.—In an action for damages resulting to a passenger from the refusal of the conductor to stop his train at the passenger's station evidence for the company, not only that the train was a through freight train, but also that it was not running on schedule time, but on telegraphic orders, and that the station was not a telegraph station, is admissible.

1. Cited in *St. L. I. M. etc. R. Co. v. Atchison*, 47 Ark. 74, 2 Am. Neg. Cas. 136; *St. L. I. M. etc. R. Co. v. Person*, 49 Ark. 182, 188, 2 Am. Neg. Cas. 139; *Hobbs v. T. & P. R'y Co.*, 49 Ark. 357, 360; *St. L. etc. R'y Co. v. Box*, 52 Ark. 368, 371; *R'y Co. v. Mayes*, 58 Ark. 397, 2 Am. Neg. Cas. 155.

2. This case was again before the Supreme Court of Arkansas in March, 1889 (reported in 11 Southwest Rep.

212), where it was *held*, that the railroad company was not liable for injuries to plaintiff resulting from his jumping from a train that was running at the rate of ten or twelve miles an hour, there being no evidence that plaintiff had reason to believe he would receive bodily harm if he remained on the train or that he would have been ejected by force while the train was in rapid motion if he had not gone voluntarily.

APPEAL from Nevada Circuit Court.

Appellee embarked at Prescott, on a through freight train of the appellant, for Emmett, a station on appellant's road, eight miles distant, without any attempt to learn that the train would stop there. Soon after leaving Prescott the conductor took up his ticket, and informed him and other passengers for Emmett that the train would not stop there, and, according to the evidence, was angry at their getting on his train, instead of waiting for the passenger train. Upon approaching Emmett, he directed them to get ready to get off, and on reaching there, without slackening his speed, ordered them in a rude and offensive manner to jump off. Soon afterwards, while the conductor was at the rear of the caboose, the appellee jumped from the front platform and was injured, and sued the appellant for the injury. The train was running at the rate of ten or twelve miles an hour when the appellee jumped off.

DODGE & JOHNSON, for appellant, cited: *Shear. & Redf. on Neg.* § 283; *Thomp. on Car. of Pass.* 267, 335-343; 23 Pa. St. 147; *R.R. v. Hendricks*, 26 Ind. 232; 9 La. Ann. 441; 59 Mo. 37; 68 Ib. 593; 30 Ohio St. 223; 116 Mass. 269; 49 N. Y. 177; 3 A. & E. R'y Cas. 429; 37 Ark. 520; 56 N. Y. 302; 53 Ill. 510; 26 Id. 373; *R.R. v. Morris*, Va. Sup. Ct. Nov. 1878; 66 N. C. 494; *R.R. v. Powell*, 40 Ind. 37; 7 Allen, 207; 14 Id. 429; 1 Suth. Dam. 720, 724 and cases; 1 Otto, 489; 21 How. 213; 2 Wall. 164; 28 Ark. 448; 35 Ia. 306; 29 Mich. 202; 1 A. & E. R'y Cas. 255 and note; 3 Id. 467; 53 Ill. 510; 49 Tex. 35; 40 Ark. 321; 50 Ind. 141; 4 Lans. N. Y. 147; 24 N. Y. 599; 60 Ind. 12; 53 Ill. 510; 3 A. & E. R'y Cas. 340; 12 Id. 141; 78 Mo. 610; 60 Ind. 12; 53 Id. 510; 87 Ill. 547; 86 Id. 62; 59 Ind. 105; 80 Ill. 51; 43 Md. 70; 81 Ill. 478; 33 Mich. 143; 57 Mo. 138; 90 Ill. 430, 612; 83 Id. 150; 41 Iowa, 353; 21 Minn. 442; *Const. Ark.* 1874, Art. 7, § 23; 14 Ark. 295, 537; 16 Id. 593; 18 Id. 526; 24 Id. 543; 36 Id. 454; 35 Id. 155; 34 Ark. 702; 43 Id. 295; 2 Am. & E. R'y Cas. 260-2.

Cockrill, Ch. J.—There was no dispute about the cause of the injury in this case. The appellee jumped from a running train, which, according to the testimony of most of the witnesses, was under full headway at the time, and by his own statement

was moving at the rate of ten or twelve miles an hour. The appellee's conduct in leaping from the train was the proximate cause of the injury of which he complains, and the question with the court and jury on the trial was whether his action was justifiable or negligent.

The court, at the instance of the appellee, gave a long and somewhat complicated instruction to the jury, from which we infer that it was intended to charge that it was negligence on the part of the company to refuse to stop its train at the station of his destination in order to allow appellee to alight, and that this, coupled with the fact (if they should find it to be a fact) that he acted in obedience to the directions of the conductor in leaping from the train, would justify the act; and also, in the same instruction, that the leap was justifiable if the appellant so leaped under the reasonable apprehension that the conductor would eject him from the moving train unless he left it voluntarily.

The first theory does not embody the law applicable to this case, and the bill of exceptions does not disclose the evidence upon which the second could be based.

Where the risk or danger of alighting from a moving train is not apparent to the passenger, and he is urged to take the hazard by the company's employees, whose duty it is to know the danger, and does so, his conduct will not be regarded as negligent. Where the danger is obvious but slight, he has the right to rely upon the judgment of the conductor, whose duty and experience he may presume give a superior knowledge of such matters, and so justify an act which would otherwise be negligent. The cases of *St. L. I. M. & S. R.R. v. Cantrell*, 37 Ark. 419, and *M. & L. R. R.R. v. Stringfellow*, 44 Id. 322, are illustrations of this in our own reports.

Filer v. N. Y. Cent. R.R., 49 N. Y. 47, was a case of a passenger attempting to alight, while the train was in motion, in obedience to the directions of a brakeman. In disposing of the case, the court say: "That it was culpable negligence on the part of the defendant to induce or permit the plaintiff to leave the train while in motion, and a gross disregard of duty not to stop the train entirely, and give her ample time to pass off with her baggage, is not disputed. Notwithstanding this, if the plaintiff did not exercise ordinary care, and might with ordinary care and

prudence have avoided the injury, she is precluded from recovery." In *Lambeth v. Railroad*, 66 N. C. 494: "If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the manager of the train, then the resulting injury was not caused by contributory negligence or a want of ordinary care."

Ordinary care, in this case, was defined to be that degree of care which may have been reasonably expected from a sensible person in the passenger's situation. A passenger cannot throw the responsibility of his own wanton and unreasonable acts upon the company, merely because a conductor has directed it. "One who inflicts a wound on his own body must abide the suffering and the loss, whether he does it in or out of a railroad car." Black, Ch. J., in *Railroad v. Aspell*, 23 Penn. St. 147. "If, while a train is at full speed, the conductor should direct a passenger to jump out at a point extremely hazardous, it would hardly excuse the passenger from the legal consequences of contributory negligence if he acted voluntarily." *Railway v. Krouse*, 30 Ohio St. 222.

"Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured by leaping from them, and the attempt to leave the cars under such circumstances, even at the instance of the railway servants, would have been a wanton and reckless act, and no recovery could have been had against the defendant." *Filer v. Railroad*, *supra*.

The appellee was not an infant or *non compos*. He was not put to a sudden election in an emergency to choose between the least of two impending evils. He had been informed by the conductor, soon after entering the train, that it was a through freight and that the station of his destination was not one of its stopping points. Just before reaching the station he was told the train would not stop. No check, he himself testifies, was made in the speed of the train, but he chose his ground when the station was passed, and leaped. It was a rash and reckless exposure of the person to peril, and the command of the company's agent did not justify it. As was said in *Railroad v. Jones*, 95 U. S. 439: "As well might he have obeyed the suggestion to put himself on the track before the advancing wheels of the locomotive."

To be forcibly ejected from a moving train would, obviously, be attended with more danger than to leap from it, and if the appellee had been justified in the belief that he would be ejected if he did not go voluntarily or without force, no blame could be attached to his conduct. In such case the railroad, being the author of the original peril, would be answerable for the consequences. *Railroad v. Aspell, supra*; *Nelson v. A. & P. R.R.*, 68 Mo. 593; *Stokes v. Saltonstall*, 13 Pet. 181.

It was upon this theory that the court instructed the jury at appellee's instance; and upon its own motion they were told, that the appellee was "induced to jump from the train by reason of the orders, threats, show of force, language and manner of the conductor," and that these were of such a nature as to cause a reasonable man to believe that if he remained on the train he would receive bodily harm or be forcibly ejected from the moving train. The latter instruction is open to the objection that it assumes as a fact that there were threats of violence and a show of using force by the conductor. It invades the province of the jury. *Floyd v. Ricks*, 14 Ark. 295; *St. Bank v. McGuire*, *Ib.* 537; *Montgomery v. Erwin*, 24 Id. 543; *Randolph v. McCain*, 34 Id. 702.

But the evidence would not warrant the jury in finding that there were threats of violence or a show of force, and there is nothing disclosed in the record from which it could reasonably be inferred that the appellee would have suffered any bodily harm by remaining upon the train. These instructions would lead the jury to infer that the evidence tended to establish the facts hypothetically stated in the first, and assumed to exist in the other, and ought not to have been given. *L. R. & Ft. Smith R'y v. Trotter*, 37 Ark. 593; *Lawrence Co. v. Coffman*, 36 Id. 641.

The appellee had not been directed or induced by any of the company's employees to enter the train. He had made no effort to ascertain whether it would stop at his destination or not. It was his duty to do this. There were other trains going to his destination on the same day, and his mistake in taking a through train cast no obligation on the company to stop its train at a point the regulations of the road forbade, and the bare refusal of the conductor to do so was no dereliction of his duty and was not

negligence to be visited on the company. *R.R. v. Nuzum*, 54 Ind. 141; *R.R. v. Hatton*, 60 Ind. 12; *Fink v. R.R.*, 4 Lans. (N. Y.) 147; *L. R. & Ft. Smith R'y v. Miles*, 40 Ark. 321, and cases cited; *Marshall v. R.R.*, 78 Mo. 610.

The company offered to prove on the trial that the train in question was not only a through freight, not stopping at the appellee's station, but also that it was not running on schedule time, but by telegraphic orders, and that the appellee's station was not a telegraphic station. All of this was competent evidence, and should have been admitted. It was material to ascertain whose was the first fault, appellant's or appellee's, and if the appellant's, then whether it would excuse the appellee's. If the appellee, through his own neglect, had embarked on a mere wild train which the conductor could not delay without the danger of throwing the passenger and freight travel of the road into confusion, it was his duty to refuse to stop merely for a passenger's accommodation. The fact that he took the appellee's ticket could not alter the rule under such circumstances. *R.R. v. Hatton*, *supra*; *R.R. v. Randolph*, 53 Ill. 510, and authorities cited, *supra*.

That the conductor's conduct was rude and that he grossly violated the duty the carrier owes to its passengers, the jury were fully justified in believing, and their just indignation at his conduct is evidenced in the round verdict they returned against the appellant; but the appellee's suit is for a personal injury, which, as we have seen, was the result of his own misconduct, and not the consequence of the conductor's acts.

For the errors indicated, the judgment will be reversed, and the case remanded for a new trial.

LITTLE ROCK & FORT SMITH RAILWAY CO. v. ATKINS. (1)

Supreme Court, Arkansas, November, 1885.

[Reported in 46 Ark. 423.]

BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE.—Contributory negligence is a defense and the proof of it devolves upon the defendant who alleges it, and therefore holds the affirmative of the issue.

1. Cited in *St. L., I. M. etc. R'y* Am. Neg. Cas. 139; *Jones v. Mal-*
Co. v. Person, 49 Ark. 182, 188, 2 *vern Lumber Co.*, 58 Ark. 125, 131.

NEGLIGENCE IN LEAVING A MOVING TRAIN.—It is not negligence *per se* for a passenger to leave a moving train. Whether he is culpable or excusable in a certain case, depends on the rapidity of the motion, the fact whether it is day or night, the distance from the car to the ground or other surface upon which the passenger proposes to alight, the age and vigor of the party and whether he takes the risk by the command or encouragement of the company's agents in charge of the train, or to escape a greater peril.

APPEAL from Johnson Circuit Court. The facts appear in the opinion.

J. M. MOORE, for appellant, cited: St. L. I. M. & S. R'y Co. *v.* Cantrell, 37 Ark. 526; Lake Shore and M. S. R'y *v.* Bangs, 47 Mich. 470; Burrows *v.* Erie R'y Co., 63 N. Y. 556; Gavett *v.* M. & L. R.R. Co., 16 Gray, 506; Jewell *v.* Ch. St. P. & M. R'y Co., 6 A. and E. R'y Cas. 379; 54 Wis. 510; Cumb. Valley R.R. Co. *v.* Mangans, 61 Md. 53; Secer *v.* T. P. & W. R. Co., 10 Fed. Rep. 15; R.R. Co. *v.* Aspell, 23 Pa. St. 149; C. R. & B. Co. *v.* Letcher, 69 Ala. 106; Shear. & Redf. on Neg. § 278; N. O. R.R. Co. *v.* Statham, 42 Miss. 607; T. W. & W. R.R. Co. *v.* Baddeley, 54 Ill. 19; 2 Wood on R'y Law, 1128.

A. S. MCKENNON and J. E. CRAVENS, for appellee, cited: T. W. & W. R.R. Co. *v.* Baddeley, 54 Ill. 19; 5 Am. R. 71; Cumb. Valley R.R. Co. *v.* Mangans, 61 Md. 53; 18 A. & E. R. Cas. 182; 17 Mich. 99; 49 N. Y. 47; 59 Mo. 27; 4 Ont. Rep. 201; 45 Ga. 288; 66 N. C. 494; 53 Ill. 510; 54 Id. 133; 46 Texas, 356; 21 A. & E. R'y Cas. 364; 98 N. Y. 128; 37 Ark. 523.

Smith, J.—Atkins and wife recovered a verdict and judgment for \$1,200 on account of injuries sustained by the female plaintiff in alighting from one of the defendant's trains. The answer denied negligence on the part of the company's servants, and alleged that the plaintiff was guilty of contributory negligence.

The object of the appeal being to test the correctness of the instructions that were given and refused, we state so much of the evidence as is necessary to show their relevancy.

Mrs. Atkins was a passenger bound for Knoxville, a station on the defendant's road, which the train reached, in daylight, twenty minutes late. The testimony conflicted as to the length of the stop made. Some of the witnesses stated that the train barely came to a halt, and immediately proceeded on its way. The

trainmen and others in the employ of the defendant deposed that the stop was sufficient to enable passengers to alight in safety—say from thirty seconds to two minutes. As soon as the train became stationary Mrs. Atkins left her seat and went to the platform of the car. One witness swore that she hesitated, and appeared to be looking out for friends to meet her, and acted so irresolutely as to produce the impression in the mind of the witness that it was not her intention to debark at the station. She stated, however, that she lost no time, but when she reached the platform the train had started again. All the witnesses agree that it was then moving very slowly, having gone only a few feet. Mrs. Atkins was incumbered with a heavy valise, and attempted to step from the car platform to the station platform adjacent. She fell and sustained serious injuries. Her age was fifty-eight years, and she says that she was as active as persons of that age usually are. A merchant testified that she was in his store about five months before that, and was so feeble that she had to remain seated while he waited upon her. Another witness said that he had lived neighbor to her two years ago, and she was in very feeble health. Still another testified that she staggered as she walked from her seat to the door of the car. But this may have been caused by the valise which she carried in her hand, or by rising from her seat simultaneously with the stoppage of the train.

The following directions were given at the instance of the plaintiff:

First.—Railroads are public carriers, and the utmost care is required of them for the safety of passengers upon their trains.

Second.—A passenger is entitled to a reasonable time to leave the car in which he has been riding. When a train is stopped for that purpose, and when reasonable time is not in fact allowed to get off in safety (of which juries are the judges), and in attempting to do so, without fault on his part, injuries result to him, he is entitled to recover from the railroad company for such injuries.

Third.—If the jury find that the plaintiff, Ruth Atkins', own negligent conduct caused, or contributed to cause, the injury received by her, they will find for the defendant.

Fourth.—Negligence consists in a want of the reasonable care which would be exercised by a person of ordinary prudence,

under all existing circumstances, in view of the probable danger of injury.

Fifth.—If the jury find from the evidence in this cause that the defendant's train did not stop at the station at Knoxville long enough to enable the plaintiff, Ruth Atkins, to leave the car and reach the platform while the train was stationary, and that she stepped off therefrom on the platform while the train was in motion, it is a question for the jury to say whether she was guilty of negligence, as above defined, and barred thereby from a recovery for the injuries received.

Sixth.—If the jury find from the evidence in this cause that the defendant's train did not stop long enough at the platform to allow the plaintiff to leave the train while standing, and that she stepped therefrom while it was in such slow motion as not to indicate recklessness, imprudence or negligence, as heretofore defined, and that she received injuries by a fall from the motion of the train, she is entitled to recover, and if you find for the plaintiff, Ruth Atkins, you will assess her damages at a sum sufficient to compensate her for injuries sustained, the pain suffered, the effects of the injury on her health according to its degree and probable duration, the expense to her of her sickness resulting from the injury and of attempting to effect a cure.

The court gave the following instruction on its own motion, against the objection of defendant :

“ A reasonable time to get off as mentioned in these instructions is such time as it usually requires for passengers to get off and on the train at that station in safety.”

In behalf of the defendant the court charged as follows :

First.—It was the duty of the plaintiff to exercise reasonable diligence in alighting from the train upon its arrival at the station ; and if you believe the train stopped long enough to enable her to have alighted by the exercise of reasonable diligence, you will find for the defendant

Second.—Railway passengers are required to take notice of the usual regulations. Where it is the custom to signal the approach to a station by the blowing of a whistle, and to announce the name of a station in the cars for the purpose of giving notice and opportunity to passengers to be in readiness to depart without delay when the train stops ; and when these regula-

tions are observed, it is the duty of the passengers to make themselves ready to get off at once, and if there is any reason why they need assistance, or require more than the usual time, they should notify the officers and servants on the train.

Third.—The defendant was under no obligation or duty to the plaintiff on account of her age or feeble condition, to assist her off the train, or to stop longer at the station than was usual, to enable her to get off, unless she had notified the conductor or some employee on the train of her condition.

The defendant also prayed the following direction :

Fourth.—If the act of the plaintiff in attempting to get off the train after it had started was such as a prudent person in her condition, exercising care proportioned to the danger, would not have done, the defendant is not liable for the injury, and the jury in deciding whether it was prudent for her to attempt to alight, will take into consideration her age and physical condition. A passenger who is old and feeble has no right to take a risk that a person in that condition cannot prudently take and throw the consequences upon the carrier, the railroad company in this case.

The bill of exceptions recites that the court struck off from this instruction the ordering words at the end thereof, and gave the residue of said instruction, to wit : " If, in this cause, you believe from the evidence the plaintiff delayed and remained in the car longer than was usual, and on account of such delay was too late to get off before the train started, the defendant is not liable for her injuries, and you will find for the defendant."

The court refused the following requests of the defendant :

Fifth.—It was the duty of the defendant, upon the approach of the train to the station, to announce the name of the station, and of the plaintiff to get herself in readiness to get off as soon as the train should arrive and stop at the station, or if, from age and debility, she was not able to get off with usual diligence, or without assistance, it was her duty to notify the defendant's servants of her condition. Upon the arrival of the train it was her duty to get off at once, and the defendants were required to stop the train a reasonable length of time to enable the passengers to alight; but they were not required to stop longer on account of any inability of plaintiff to get off promptly, or to assist her in alighting, unless she had notified them of her con-

dition. A reasonable time was as much time as usually had enabled passengers to get off and get on the train at that station in safety.

If you believe that no notice was given that plaintiff required assistance, or more than the usual time to get off, and that the train stopped a reasonable time at the station, you will find for the defendant, even though she may have been unable to get off within the usual time or without assistance. If the train was not stopped a reasonable time to enable the plaintiff to get off, it was her duty to remain in the car and request the employees in charge of the train to carry her back to the station, and, if they refused, to go on to the next station, and she would have been entitled to sue and recover from the defendant damages for the annoyance and inconvenience caused to her by being carried by her station; but she had no right to run any risk of injury by attempting to get off after the train had started. And if, from her age or weak and feeble condition, it was imprudent for her to attempt to alight after the train was in motion, the defendant is not liable for the injury that resulted to her, and it is your duty to find for the defendant.

Sixth.—If she was infirm from recent illness and was by that reason prevented from alighting before the train started, when a person free from injury could, by reasonable diligence, have alighted, and did not notify the employees on the train of her feeble condition, the defendant is not liable for the injuries, and you will find for the defendant.

Seventh.—If you find that the plaintiff, upon the arrival of the train at Knoxville, did not immediately proceed to get off, but delayed for a time, waiting or looking for friends to meet her, and that it was by reason of her delay that the train was put in motion before she got off, the defendant is not liable for her injuries, and you will find for the defendant.

Eighth.—If you believe from the evidence the plaintiff was looking for friends to meet her at the depot, and when the train stopped that she delayed, looking for her friends instead of getting off at once, and was thereby delayed until it was too late for her to get off before the train started, you will find for the defendant, although you may believe the defendant was negligent in not stopping the train a greater length of time.

Ninth.—If you find from the evidence that the train was stopped the average length of time at the station that passengers were in the habit of getting off and on at that station, and the time had always, on previous occasions, been sufficient, there was no negligence on the part of the defendant, and you will find for the defendant.

Tenth.—If you believe the train was stopped long enough to enable passengers of usual health and vigor to have alighted by the exercise of reasonable diligence, you will find for the defendant, unless you further find defendant's servants were notified that plaintiff was unable to get off within the usual time.

Eleventh.—If you believe the plaintiff's injury was caused by the mutual fault of the plaintiff and defendant, you will find for the defendant, although defendant's fault may have been greater than plaintiff's.

Twelfth.—The mere fact of the injury does not render defendant liable. It must have been caused by defendant's negligence, unmixed with any fault on plaintiff's part. And the plaintiff must prove negligence on the part of the defendant, and that she was free from negligence on her part. And unless you find from the weight of the evidence, first, that defendant was guilty of negligence which contributed to her injury; and, second, that she was free from fault or negligence, you will find for the defendant.

Thirteenth.—If you believe from the evidence that the plaintiff's injuries were caused by her attempting to get off the train while it was in motion, that she was at the time old and feeble, you will find for defendant, even though you may believe defendant was guilty of negligence in not stopping the train a longer time at the station.

Fourteenth.—If you believe from the evidence that the plaintiff was old and infirm to such an extent that it was dangerous for her to attempt to get off the train while it was in motion, you will find for the defendant, although you may believe defendant was negligent in not stopping the train longer at the station.

Fifteenth.—If the defendant was aged and feeble, so that she needed assistance in alighting from the cars, it was contributory negligence for her to attempt to get off the cars while the train was in motion, and you will find for defendant, although you may

believe defendant was also negligent in not stopping the train longer at the station.

Sixteenth.—If you believe from the evidence that it was imprudent, in view of her age and feeble condition, for the plaintiff to attempt to get off the train while it was in motion, you will find for the defendant, although you may believe that the train was not stopped long enough to give her time to alight.

Eighteenth.—If the plaintiff was old and feeble, and attempted to get off the train while it was in motion, with a heavy valise in her hand, such act constituted contributory negligence on her part, and she cannot recover in this action.

An exception in mass was attempted to be reserved to the six instructions given in behalf of the plaintiff. We perceive no serious objection to any of them, nor to the direction given on the court's own motion.

We confess our inability to comprehend what modification the court made of the fourth prayer of the defendant, what portion of it was granted and what rejected, and in what form the instruction was finally given. Under such circumstances, the presumption is the instruction as modified embodied the law. *Smith v. Childress*, 27 Ark. 328; *St. L. I. M. & S. R'y Co. v. Hecht*, 38 Id. 357.

Of the denial of the remaining prayers, error cannot be justly predicated. The fifth, sixth, thirteenth, fourteenth, fifteenth, sixteenth and eighteenth assume the existence of a state of facts, of which the record contains no evidence, viz.: the enfeebled and debilitated condition of the plaintiff. Whatever of value or sound law was contained in the seventh, eighth, ninth, tenth and eleventh had already been given in charge to the jury. The repetition and reduplication of instructions is a practice not to be commended. All the law applicable to this case, which it was necessary for the jury to know, might have been expressed in half a dozen concise propositions.

The twelfth prayer announced an incorrect rule of law. Contributory negligence is a defense and the proof of it devolves upon the defendant, who alleges it, and therefore holds the affirmative of this issue. The courts of last resort in Massachusetts and several other States have, indeed, adopted the contrary principle—that the plaintiff must show he was in the exercise of due

care at the time the injury happened. But this, it is believed, is inconsistent with the rule of evidence, adjusting the burden of proof according to the state of the pleadings; and it is certainly opposed to the weight of authority as settled in England, in the Supreme Court of the United States and a majority of the States of the Union. The cases on this subject are collected in Beach on Contributory Negligence, §§ 156-7.

This court has already given in its adhesion to the more reasonable rule—that the plaintiff will be presumed to have been ordinarily prudent until the contrary appears, either from his own evidence, or that of the defendant. *T. & St. L. R. Co. v. Orr*, 46 Ark. 182.

The jury in this case might well have concluded from the testimony that the railroad company had not afforded a reasonable time to passengers, who held tickets for Knoxville, to leave the cars in safety.

The next question was whether the plaintiff was herself negligent, either in getting off promptly or in getting off at all, under the circumstances in proof. These were essentially questions of fact; and some of the rejected prayers sought to take the last-mentioned question from the jury. It is not negligence *per se* for a passenger to leave a moving train. As was said by Mr. Justice Harrison in *St. L. I. M. & S. R'y Co. v. Cantrell*, 37 Ark. 526, "It may, as a general proposition, be said, that it is imprudent and a want of ordinary care to alight from a train while it was in motion; but whether it was so in a particular case must depend upon the circumstances under which the attempt was made. It would not be so, if the train was moving so slowly that no damage could be reasonably apprehended." Whether it was culpable or excusable, depends on the rapidity of the motion, the fact whether it is day or night, the distance from the car to the ground or other surface upon which the passenger proposes to alight; the age and vigor of the party, and whether he takes the risk by the command or encouragement of the company's agents in charge of the train, or to escape a greater peril. *M. & L. R. R.R. Co. v. Stringfellow*, 44 Ark. 322; *St. L. I. M. & S. R'y Co. v. Rosenberry*, 45 Ark. 256; *Sibley, Rec'r, v. Smith*, 46 Ark. 275; *Cumb. etc. R. Co. v. Mangan*, 61 Md. 53; *Filer v. N. Y. C. R.R. Co.*, 49 N. Y. 47; *Morrison v. Erie R'y Co.*, 56 Id.

302; *Bucher v. N. Y. C. & H. R. R.R. Co.*, 98 Id. 128; *Penn. R.R. Co. v. Kilgore*, 32 Pa. St. 292.

The plaintiff was not threatened with any danger by remaining on the cars, nor did she act upon the advice of any of the trainmen. But she was compelled to decide upon a sudden emergency, whether she should leave the train, or be carried past her destination. And although the event showed that she underrated the danger, yet as the danger was not apparent, she should not be held to the most rigid accountability for her mistake of judgment. *Filer v. N. Y. C. R.R. Co.*, *supra*; *Salter v. Utica, etc. R. Co.*, 88 N. Y. 49; *Bucher v. N. Y. C. & H. R. R.R. Co.*, *supra*.

Affirmed.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY CO. v. ATCHISON. (1)

Supreme Court, Arkansas, November, 1885.

[Reported in 47 Ark. 74.]

TAKING UP PASSENGER'S TICKET DOES NOT CONSTITUTE CONTRACT TO STOP AT STATION NAMED.—Because a conductor took up a passenger's ticket to a station at which the train was not allowed to stop by a regulation of the company, that fact did not make it the duty of the conductor to stop the train there.

PASSENGER CANNOT RECOVER FOR REFUSAL OF CONDUCTOR TO STOP TRAIN AT STATION FORBIDDEN BY COMPANY'S RULE.—Before a passenger boards a train it is his duty to ascertain whether it will stop at his station, and if he attempts to do so and is misled by an agent authorized to speak for the company, he has his action against the company for the misdirection; but he cannot recover because the conductor refused to stop the train at a station that the company's regulations forbid the train to stop at.

APPEAL from Lafayette Circuit Court.

DODGE & JOHNSON, for appellant, cited: *St. L. I. M. & S. R'y v. Cantrell*, 37 Ark. 519; *M. & L. R. R.R. v. Stringfellow*, 44 Id. 322; *Files v. N. Y. Cent. R.R.*, 49 N. Y. 47; *St. L. I. M. & S. R'y v. Rosenberry*, 45 Ark. 256; 66 N. C. 494; 23 Penn. St. 147; 30 Ohio St. 222; 95 U. S. 439; 67 Mo. 593; 13 Pet. 181.

1. Cited in *Hobbs v. T. & P. R'y Co.*, 49 Ark. 357, 360.

Cockrill, Ch. J.—The main features of this case are similar to those of *Rosenberry's* case, reported in 45 Ark. 256 (1). The appellee boarded a through freight train at Prescott to be transported to Emmett. Emmett was not one of the usual stopping places for the train, and it made no halt there on the trip in question, but the appellee alighted nevertheless, and in doing so injured his toe and received a shock which prevented him from engaging in active out-of-door labor for a few weeks. He sued the company to recover damages for the personal injury, and a jury awarded him \$5,000. His contention was that the conductor had compelled him to leave the train while it was in motion. *Rosenberry* was the appellee's fellow passenger and took the leap with him, but the facts in the two cases are not identical.

The points of difference are that the appellee in this case testified that the station agent at Prescott advised him to board the freight train, suggesting that it would stop on that trip at Emmett; and there was more evidence of overbearing conduct on the part of the conductor toward this appellee than towards *Rosenberry*. While there is a little evidence to the contrary, it seems apparent that the appellee leaped from the train under a preconceived intention to do so rather than from any fear of the conductor. But it is not necessary to weigh the evidence to determine whether the verdict should be sustained. The judgment must, in any event, be reversed for misdirection of the jury. For the guidance of the court in another trial it is sufficient to advert simply to what is said in the *Rosenberry* case about the advice or command or compulsion of the conductor, excusing or not excusing the conduct of a passenger in exposing his person to obvious danger. The charge of the court in this respect is less obnoxious than in the *Rosenberry* case. But the court in this case charged the jury as follows, as to the duty of the railroad to stop its train at Emmett to let the appellee off:

"If you find from the preponderance of the testimony that the conductor of the train upon which plaintiff was traveling took up his ticket for Emmett, then it became the duty of said conductor to stop said train at Emmett so as to enable plaintiff to get off said train, notwithstanding any regulation or custom of the

1. See this case reported on p. 122, *ante*.

company to the contrary. The acceptance of a ticket by the company's conductor makes a contract for the carriage of the passenger to the station named on said ticket, and the company cannot excuse themselves for any willful, wanton or malicious acts of the conductor towards such passenger, by any rule or regulation as to the running of their through freight trains."

The refusal of the trial court to give the converse of this instruction in so far as it relates to the company's obligation to stop at the passenger's destination, was held to be reversible error by the Supreme Court of Illinois, in a case closely analogous to this. See *C. & A. R.R. Co. v. Randolph*, 53 Ill. 510. In that case, as in this, the appellee purchased a ticket of the station agent and boarded a through freight train headed to his destination. The conductor took up his ticket, and refused to stop the train at his station, but upon arrival there, and when the train, from an up-grade, was not going at full speed, told him then was his time to get off. The appellee leaped, was injured, and sued the company. The trial court refused to instruct the jury that the taking of the plaintiff's ticket by the conductor did not constitute a contract binding upon the company to stop the train at the point of destination mentioned in the ticket; but on appeal it was ruled that the jury should have been instructed as asked. We reached a similar conclusion as to the company's duty in regard to this same train in *Rosenberry's case*.

Railroad companies sometimes run trains that stop only at principal stations on their roads, and the propriety of so regulating their business cannot be challenged, when they furnish a reasonable number of other trains which stop regularly at intermediate stations to accommodate the traveling public. It is the duty of a passenger to ascertain whether the station of his destination is one of the stopping places of the train he wishes to board before embarking, and if he attempts to do so and is misled by an agent whose employment authorizes him to speak for the company, he has his action against the company for the misdirection; but such misdirection does not alter the duty of the conductor. He must run his train according to the regulations of the company; otherwise in lieu of that precision and regularity which are required in the management of trains to insure safety, we should have only uncertainty, irregularity and insecurity. The

station agent cannot thus legally throw upon the conductor the blind hazard of injury to his master and the passengers committed to his care. *Marshall v. St. L. K. C. & N. R'y*, 78 Mo. 610.

But in this case the mistake of the station agent, if there was a mistake, was not communicated to the conductor at all. The jury were told, however, that it was the company's duty to stop for the accommodation of the appellee, and the instruction was in all likelihood understood to mean that a failure to do so was "wanton, willful and malicious conduct," on the part of the company, which, as they were told in another part of the charge, would warrant the infliction of punitive damages. How far this error went toward making up the verdict we are unable to determine.

Let the judgment be reversed and the case remanded for a new trial.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. PERSON.

Supreme Court, Arkansas, May Term, 1887.

[Reported in 49 Ark. 183.]

ALIGHTING FROM MOVING TRAIN—INSTRUCTION.—In an action to recover damages for personal injuries sustained through the alleged negligence of the railway company, the defendant requested the following instruction, which was refused: "If the jury believe from the evidence, that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured, they will find for the defendant." *Held*, that this was properly refused, as it seeks to make it negligence *per se*, and inexcusable, for the plaintiff to alight from the train while it is in motion; and that whether he is guilty of negligence is a question to be determined from all the circumstances in proof.

CONTRIBUTORY NEGLIGENCE.—Where a passenger, while the train is in motion, attempts to alight under the conductor's direction at a station to which the passenger is bound, although the train was moving slowly and the danger was not apparent: *Held*, that the plaintiff was not guilty of such contributory negligence as to bar a recovery for the injury.

DUTY OF CONDUCTOR TO STOP CARS.—In such action it was *held*, that the conductor of a passenger train is bound to stop the cars at a regular station at which such passenger desires to alight, and to keep the cars at a standstill a reasonable time to allow the passenger to leave the cars in safety.

APPEAL from Pulaski Circuit Court.

Action to recover damages for personal injuries sustained by appellee in having his leg broken through the alleged negligence of the appellant. The complaint charged that on December 25, 1884, plaintiff was a passenger on defendant's train on his journey from Little Rock to his home at Mabelvale; that the conductor of the train failed to stop his train at Mabelvale a sufficient length of time to enable plaintiff to get off safely, but, at the same time, pressed and urged the plaintiff to get off while the train was in motion; and by reason of the darkness of the night, the train having passed the platform, plaintiff, in getting off, fell and broke his leg, whereby he suffered great pain, etc., to his damage \$5,000. The answer denied specifically all of the allegations of the complaint, and charged contributory negligence on the part of plaintiff.

The court gave the three following declarations of law, over defendant's objections: 2. "The court instructs the jury, that if they believe, from the evidence in the cause, that the plaintiff, at the time stated in his complaint, had purchased from the defendant company a ticket from Little Rock to Mabelvale station, and entered its regular passenger train for the purpose of being carried there, and that said Mabelvale was a regular station upon the line of railway, where passengers are accustomed to get on and off its trains, then it was the duty of the conductor of such train to stop the cars at said station, and keep them at a standstill a reasonable length of time, sufficient to enable the plaintiff to leave the cars in safety. And if the jury further believe, from the evidence in this cause, that the conductor failed to comply with his duty in that behalf, and that, by reason of such failure, the plaintiff, while attempting to get off such train at said station, was injured without contributory negligence on his part, the defendant is liable therefor, and the jury should find for the plaintiff. And the court further instructs the jury, that if they believe, from the evidence in this cause, that upon arriving at said station the train was stopped, but, before the plaintiff was able to alight therefrom,

the train was started up again, and that the plaintiff was ordered by the conductor to get off, and under such directions attempted to do so while the train was going slow, and the danger of so doing was not apparent, the plaintiff had a right to rely upon the conductor's judgment, and his obeying such direction was not such contributory negligence as would bar his recovery." 3. "If the jury find, from the evidence, that the plaintiff was ordered or directed by the conductor or agent of the defendant to get off the train, he had a right to rely upon such advice or direction, provided he took no more risk in getting off the train than a prudent man would have taken under the same circumstances." 4. "If the jury find that the plaintiff took no more risk than a prudent man would under the circumstances, he is not guilty of contributory negligence."

The court gave several instructions as asked by defendant, among them being the following: 1. "If the jury believe, from the evidence, that the plaintiff jumped off the train after it had begun to move away from the station at Mabelvale, and the night was so dark that he could not see whether there was a safe place for him to alight, and that he did this voluntarily, and for no other reason than because he did not wish to be carried past his station, and that a man of ordinary prudence would not have so jumped, they are authorized to find that the injury was caused by the contributory negligence of plaintiff, and he cannot recover."

The court refused to give the following, as asked by defendant: 5. "If the jury believe, from the evidence, that the train was stopped a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted; that, failing to do so, he leaped from the train after it had started and while it was in motion, and was thereby injured, they will find for the defendant."

The court, on its own motion, over defendant's objection, gave the following further instruction: 1. "Where the risk of danger of alighting from a moving train is not apparent to the passenger, and he is urged to take the hazard by the company's employee, whose duty it is to know the danger, his conduct will not be regarded as negligent. Where the danger is obvious, but slight, he has the right to rely upon the judgment of the conductor, whose duty and experience he may presume give a superior knowledge of such matters, and so justify an act which would

otherwise be negligent. If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the plaintiff acted under the instructions of the manager of the train, then the resulting injury was not caused by contributory negligence or want of ordinary care."

Ordinary care was defined to be that degree of care which may have been reasonably expected from a sensible person in the passenger's situation. A passenger cannot throw the responsibility of his own wanton and unreasonable acts upon the company, merely because the conductor directed it.

The jury awarded plaintiff \$865 damages. Motion for a new trial was filed, and overruled, and an appeal prayed.

DODGE & JOHNSON, for appellant, cited: *Shear. & Redf. on Neg.* §§ 25-35, 265, 282, 283; *Whart. on Neg.* §§ 300, 353, 369, 371, 626; *Railway Co. v. Hendricks*, 26 Ind. 228; *R'y Co. v. Whitfield*, 44 Miss. 466, 486; *R'y Co. v. Hazzard*, 26 Ill. 384; 2 *Red. Rail. L.*, § 177; *Garrett v. R'y Co.*, 16 Gray, 502-507; *R'y Co. v. Slatton*, 54 Ill. 133; *Lambeth v. R'y Co.*, 66 N. C. 499; *Nichols v. R'y Co.*, 106 Mass. 464; *Filer v. R'y Co.*, 49 N. Y. 47; *Pa. R'y Co. v. Aspell*, 23 Penn. 149, 150; *Same v. Kilgore*, 32 Pa. 296; *Curtis v. R'y Co.*, 20 Barb. 282; *Morrison v. R'y Co.*, 56 N. Y. 305; *Sullivan v. R'y Co.*, 6 Casey, 234; *R'y Co. v. Schiebe*, 44 Ill. 563.

W. L. TERRY and T. E. GIBBON for appellee, cited: 37 Ark. 522; 2 *Thomp. on Neg.* 1, 2, 3, 9; 46 Ark. 437; 45 Id. 261; 46 Id. 423, 437; 47 Id. 76.

Cockrill, Ch. J.—Counsel for the appellant have not undertaken to point out any ground of objection to any part of the court's charge to the jury. The instructions given at the instance of the plaintiff in the action and by the court of its own motion, either announce familiar principles of law as to the duty of a carrier of passengers to stop and allow reasonable opportunity to the passenger to alight upon the platform provided for the purpose, or else state the law of contributory negligence applicable to the facts of the case almost in the language used or approved by this court when discussing the principles that control similar cases. *St. Louis, Iron M. & S. R'y v. Cantrell*, 37 Ark. 522; *St. L. I. M. & S. R'y v. Rosenberry*, 45 Id. 261; *L. R. & F. S. R'y v. Atkins*, 46 Id. 423.

The court granted all the appellant's requests for instructions as asked except one, which it rejected. The refusal to instruct the jury as asked in this particular is the only objection made to any ruling of the court at the trial that has been specifically pointed to as error. The request was this :

"If the jury believe from the evidence that the train was stopped at the station a sufficient length of time to enable the plaintiff, by the exercise of reasonable diligence, to have alighted ; that failing to do so, he leaped from the train after it had started, and while it was in motion, and was thereby injured, they will find for the defendant."

Without this, the charge of the court fairly covered every phase of the case. It had been explained to the jury that a passenger could not throw the responsibility of his own reckless or unreasonable conduct upon the company merely because the conductor had requested or directed him to hurry off, but they were told that if the motion of the train was so slow that the danger of alighting would not be apparent to a prudent man, and the plaintiff in getting off acted under the instructions of the conductor, who, they were informed, was presumed to know the hazard of the act better than the plaintiff, the latter would be exculpated from negligence, and the blame for the injury could not be visited upon him. The reasonableness of the train's stop and the duty of the passenger to alight without unnecessary delay were also impressed upon them. These features of the case are all that can be said to be covered by the request that was rejected. But it was proper to reject it independent of that consideration. Whether the plaintiff was negligent in getting off promptly, or in getting off at all, while the train was in motion, were questions of fact to be determined from all the circumstances in proof, but the rejected prayer sought to make it negligence *per se*, and inexcusable for the plaintiff to undertake to alight from the train while it was in motion ; and it was not an expression of the law upon the subject.

The evidence was conflicting, and we cannot say that the jury was not justified in the conclusion they reached.

Let the judgment be affirmed.

FORDYCE v. MERRILL.

Supreme Court, Arkansas, May Term, 1887.

[Reported in 49 Ark. 277.]

ALIGHTING FROM TRAIN—RAILROAD COMPANIES MUST KEEP THEIR STATIONS PROPERLY LIGHTED.—In an action to recover for injuries sustained by alighting from a train, it was *held*, that it was the duty of railroad companies to provide lights at their stations for the safety of passengers arriving or departing upon trains at night; and they are liable to passengers for injuries resulting from the want of such lights, unless it is shown that the passenger's contributory negligence caused the injury.

APPEAL from Ouachita Circuit Court.

B. W. JOHNSON, for appellant, cited: Wood's R'y Law, 449; 2 Id. 1098, 1107; 2 Redf. on R'ys, 298-9; 41 Ind. 269; '26 Id. 228; 51 Mo. 141; 56 Penn. 234; 46 Tex. 370; 51 Cal. 425; 49 Ind. 93; 90 Ill. 425.

H. G. BUNN, for appellee, cited: 53 Tex. 289; 34 La. Ann. 777; 18 A. & E. R. Cas. 153; 27 Ark. 592; 31 Id. 163.

Cockrill, Ch. J.—The appellee was a passenger on the Texas & St. Louis Railway, and fell and was injured while alighting from the train at her destination. She sued and had judgment for \$3,000. The bill of exceptions taken by appellant shows the evidence, and nothing more. No mention is made in it of any exceptions taken during the trial, or of a motion for a new trial.

There was a demurrer to the complaint, which was overruled, after which defendant answered and went to trial. The only questions presented, therefore, are: Had the court jurisdiction? and, Does the complaint state a cause of action? Chapline v. Robinson, 44 Ark. 202; Holleville v. Patrick, 14 Id. 208.

No question is or can be made as to the jurisdiction of the court.

The plaintiff alleged in her complaint that she was a passenger on the appellant's train: that she arrived at her destination at night; that the depot platform, through the negligence of appellant, was not provided with lights, and that by reason of appellant's failure in its duty to provide lights, she fell, and was injured in attempting to get upon the platform.

It is the duty of railroad companies to have their stations lighted for the accommodation and safety of passengers arriving or departing upon their trains, and they are liable to them for injuries resulting from the want of such lights, unless it is shown that the passenger's contributory negligence caused the injury. *Thomp. on Car.* 108; *Benuemann v. St. P. M. & M. R'y Co.*, 18 Am. & E. R'y Cas. 153; S. C., 32 Minn. 390; *Peniston v. C. St. L. & N. O. R'y*, 34 La. Ann. 777.

The complaint set forth a cause of action that was good on demurrer. *Stewart v. Int. & G. N. R'y*, 53 Tex. 289.

If the allegations specifying the particular manner in which the plaintiff was injured, or the particular cause of her fall, were deemed insufficient, a motion to make the allegations more certain or specific was defendant's remedy. A demurrer could avail nothing. *Ball v. Fulton County*, 31 Ark. 379; *McIlroy v. Adams*, 32 Id. 315; *McCreary v. Taylor*, 38 Id. 393.

Affirmed.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY v. TANKERSLEY.

Supreme Court, Arkansas, December, 1890.

[Reported in 54 Ark. 25.]

RAILROAD COMPANY NOT LIABLE FOR INJURIES WHEN SUFFICIENT OPPORTUNITY AFFORDED TO ALIGHT.—In an action for injuries received in attempting to alight at a station from a moving train, a railway company is not liable, if, after the station was called in the car, the train stopped long enough to afford an opportunity, by the use of ordinary diligence, for the passenger to alight from it while stationary.

ALIGHTING FROM MOVING TRAIN—WHEN NOT JUSTIFIED.—

The failure of a train to stop at a station does not justify an attempt to alight that is hazardous.

CONTRIBUTORY NEGLIGENCE.—The age, sex and physical condition of a passenger are to be considered in determining whether she acted prudently or recklessly in stepping from a moving train.

APPEAL from Yell Circuit Court, Dardanelle District.

Mrs. Sarah E. Tankersley, an elderly lady, was a passenger on a train on the Little Rock and Fort Smith Railroad. The com-

plaint alleged that when the train arrived at her station it stopped, but not long enough to enable her to alight in safety; that while she was in the act of alighting, the train was carelessly and negligently started with a jerk, throwing her upon the platform and seriously injuring her. Defendant answered, denying negligence on its part, and alleging contributory negligence on the part of plaintiff. Verdict for plaintiff. Defendant appealed.

DODGE & JOHNSON, for appellant, cited: Sher. & Redf. on Neg. §§ 25-35, 265, 282, 283; Whart. on Neg. §§ 300, 353, 369, 371, 626; 26 Ind. 226; 44 Miss. 486; 26 Ill. 384; 2 Redf. on R'ys, § 177; 106 Mass. 464; 23 Penn. 149; 32 Id. 296; 56 N. Y. 305; 6 Casey, 234; 44 Ill. 463; 44 Miss. 466; 20 Barb. 282; 16 Gray, 502; 54 Ill. 133; 66 N. C. 499; 12 A. & E. R. Cas. 164; 17 N. E. Rep. 107; 15 Lea, 328; 45 Ark. 256; 11 S. W. Rep. 212; 47 Ark. 77; 7 S. W. Rep. 88; 48 Ark. 473; Whart. Ev. § 40; 1 Gr. Ev. § 52; 115 Mass. 240; 118 Id. 422; 10 Allen, 148; 6 Cush. 398; 1 Gray, 511; 89 Mass. 508; 38 Mass. 145; 79 Id. 512; 53 Id. 482; 73 Id. 96; 4 Md. 242; 70 Mo. 243; 68 Id. 470; 38 Mich. 537; 45 N. Y. 574; 60 Mo. 227; Ib. 265; 8 Or. 172; 52 Barb. 267; 41 Conn. 61; 59 Iowa, 581; 69 Me. 173; 60 N. Y. 278; 44 N. Y. 465; 4 West. Rep. 48; 15 Neb. 43; 14 N. W. Rep. 541; 45 N. W. Rep. 91; 91 Mo. 433.

A. S. MCKENNON and J. E. CRAVENS, for appellee, cited: 27 Ark. 592; 31 Id. 163; 46 Ark. 423; 49 Ark. 182; 45 N. W. Rep. 91; 61 Wis. 457; 23 A. & E. R. Cas. 352.

Hemingway, J.—The injury complained of was sustained by the plaintiff, a passenger on defendant's cars, in attempting to alight at the end of her journey while the cars were in motion. Two questions were, therefore, involved in the proper determination of the cause: First, was the injury attributable to any misconduct of the defendant? Second, did the plaintiff contribute to it by any negligence on her part? There was evidence tending to maintain a contention on each side of both of the questions stated, and the charge of the court was given with reference to every aspect of the evidence.

1. The court properly charged the jury that the defendant would not be liable, if, after the station was called in the car in which plaintiff was traveling, the train stopped long enough to afford the plaintiff an opportunity by the use of ordinary diligence

to alight from it while stationary. Upon the facts assumed the defendant had discharged its full duty to plaintiff, and no injury to her could be attributed to it. Although the plaintiff may have been without fault, the defendant was then equally so, and the hurt was attributable to an unforeseen casualty. The charge of the court properly made the defendant's negligence depend upon the fact of its failing to make a sufficient stop at the station.

2. On the law applicable to the negligence of the plaintiff, the charge is subject to objections. The eighth instruction, given at the request of the plaintiff, relates exclusively to this question. It states several legal principles: 1. That to jump voluntarily from a train while in rapid motion is negligence. 2. That to step from a car while in motion to a station platform may or may not be negligence. 3. That it is for the jury to determine whether the latter act is or is not negligence. 4. That it is for the jury to determine whether the speed of the train at the time of alighting was or was not such as to make the act hazardous. But the same instruction which contains no reference to the defendant's negligence, declares that it is for the jury to determine whether there was a sufficient stop of the train, without indicating the proper effect of a negative finding. As the instruction treated only of the negligence of plaintiff that would bar her right of recovery, the inference is that if a sufficient stop was not made, that would excuse a hazardous attempt by plaintiff to alight.

That is not the law. The conduct of the plaintiff must be judged from present conditions, and upon them the past delinquency of another sheds no light. If it would seem to a person of ordinary prudence and caution to be safe to step off, considering the train's speed, the situation of the place of alighting, the opportunity to see where the step was made, and the activity of the person making it, and all other circumstances reasonably affecting the safety of the attempt—it could not be deemed negligence in the plaintiff to do it. But the failure of a train to stop does not justify an attempt to alight that is hazardous, nor is it an element to be considered in determining in any given case whether such attempt was prudent or hazardous.

We think the instruction fairly implied that a failure to make a sufficient stop fixed negligence upon the defendant and excused the negligence of the plaintiff. That was error.

The eighth instruction asked by the defendant should have been given. The act of the plaintiff was to be judged by a comparison with the acts of persons of ordinary prudence under similar circumstances, the age, sex, and physical condition were circumstances necessarily affecting her safety in stepping from a moving train, and should have been considered by the jury, in connection with all other such circumstances in proof, in determining whether she acted prudently or recklessly. A young, active man might prudently alight, when the attempt would be reckless in an old or lame man; and any man might do so prudently, when it would be dangerous for a lady in female attire to attempt it.

The defendant is not in a situation to complain that the court admitted evidence to prove that its trains were not stopped at Coal Hill on former occasions. Witnesses for the defense testified that the train stopped on the day of the injury long enough to permit all passengers to alight; to sustain their statement they testified that the rules of the company required a stop of several minutes, and that it was always made. If the evidence was incompetent, the defendant first introduced it, and cannot complain that the court permitted plaintiff to rebut it.

For the error indicated the judgment will be reversed, and the cause remanded for a new trial.

LITTLE ROCK & FORT SMITH RAILWAY CO. v. LAWTON.

Supreme Court, Arkansas, February, 1892.

[Reported in 55 Ark. 428.]

DUTY OF RAILROAD TO PERSON NOT A PASSENGER.—A person who enters a railroad car for the purpose of assisting a woman to a seat, and is injured in getting off by reason of the train not being held long enough for him to get off, cannot recover damages unless notice was given to the trainmen.

RIGHT OF A PERSON NOT A PASSENGER TO ENTER CAR.—If the employees of a railroad offer to assist a woman to a seat no other person has a right to enter a car for that purpose, and the company owes no duty to one who does so, except not to willfully or wantonly injure him.

REGULATION OF RAILWAY COMPANY PROHIBITING PERSONS ENTERING CARS.—A notice of a railroad company that all persons who have no business with the company were forbidden to enter any of its cars does not apply to a person who enters to assist a woman to a seat.

APPEAL from Pope Circuit Court.

Action by L. P. Lawton against the Little Rock & Fort Smith Railway Company, a leased line of the Missouri Pacific Railway Company. The facts appear in the opinion.

DODGE & JOHNSON, for appellant, cited: 72 Mass. 70; 59 Mo. 34; 66 N. Y. 246; 59 Md. 187; 10 S. E. Rep. 499; 84 Ga. 1; Thomp. Car. Pass. 104-5; 71 Ill. 500; 59 Pa. St. 129; 36 Ark. 50; *Ib.* 376; 41 *Id.* 549; 46 *Id.* 535; 101 Pa. St. 258; 29 Ohio St. 367; 51 Ark. 477; 45 Ark. 26; 31 Ark. 31; 8 S. E. Rep. 529; 9 A. & E. 302; 6 Ind. 533; 47 Mich. 569; 11 N. W. 153; 54 Wis. 234; 104 Ind. 13; 3 N. E. Rep. 611; 20 N. E. Rep. 776; 49 Ark. 359; 45 Ark. 26.

A. S. MCKENNON, for appellee, cited: 28 Ark. 8; 24 *Id.* 264; 34 *Id.* 649; 36 Ark. 117; 31 *Id.* 666; 45 *Id.* 251; 49 *Id.* 263; *Ib.* 189; 13 Am. & E. R. Cas. 29; 40 Ark. 321; 56 *Id.* 189.

Hemingway, J.—This was an action to recover damages for personal injuries sustained by the plaintiff while leaving the defendant's car, into which he had gone to escort a woman and child and assist with their hand-baggage to a seat.

The matters charged in the complaint to cast liability upon the defendant are as follows: First, that the defendant did not stop its train the usual length of time, or a reasonable time for persons to get on and off, and by reason thereof the plaintiff fell from the step and was injured while attempting to leave the car; and, second, that while he was engaged in leaving the car the train started with a sudden jerk, and the defendant's porter gave him "a violent thrust" with his elbow, by reason whereof he was violently thrown to the platform of the depot and badly hurt.

The questions arising upon the latter ground had better be disposed of at the outset, for as to them we find little difficulty in reaching a conclusion. According to the evidence, including that of the plaintiff himself, the sudden jerk, if there were any, occurred while he was in the car, and caused him no injury; it certainly had no connection with the hurt he received in being subsequently

thrown from the steps of the car. The porter's thrust was given as he stepped upon the car to resume his trip, and it is not alleged in the complaint nor shown by the evidence that it was due to his careless or willful neglect. It appears that he acted as porters usually do in getting upon a train that is starting upon its course; and, as it was his duty to get aboard, and there is no evidence that he did it in an improper manner, it discloses no negligence. The instructions which based a right of recovery upon this ground were improper, and should not have been given.

A more difficult question arises upon the other ground of alleged negligence—one not settled by any decision of this court. The defendant insists that, inasmuch as the plaintiff did not enter the car to take passage upon it, but only as escort to a passenger, the defendant owed him no duty except not to injure him willfully or wantonly; while the plaintiff contends that, as he went upon the car with the knowledge of the trainmen and for the purpose of rendering necessary assistance to a female passenger and little child, the defendant owed him the same duties as a passenger. The learned counsel who has presented the cause for the plaintiff cites us to no authority in support of his contention, and it impresses us as unsound; the cases relied upon by the defendant do not, as we think, bear out his position, but show that it is untenable. *Lucas v. New Bedford R. Co.*, 6 Gray, 64; *Doss v. Mo. etc. R. Co.*, 59 Mo. 34; *Coleman v. Ga. R. Co.*, 84 Ga. 1. We have concluded that neither view is correct, but that reason commends as proper a rule between the two.

In the case of the *L. & N. R. Co. v. Crunk*, 21 N. E. Rep. 31, the Supreme Court of Indiana held that a railroad company owed the same duty to those assisting a passenger upon a train as to the passenger himself; but it cites no precedent for the ruling, and it is opposed to all cases adjudged upon the subject to which our attention has been called. The law exacts from railroads for the protection of passengers the highest degree of care, and imposes a liability for all injuries which sound judgment, skill and the most vigilant oversight could have prevented; but this responsibility grows out of the relation or contract of carrier and passenger on account of the great perils of the undertaking. As this is the cause and origin of the rule, it would seem that the rule should be restricted in its application to persons who come within

that relation and such is the effect of the authorities. *Lucas v. New Bedford R. Co.*, *supra*; *Doss v. Mo. etc. R. Co.*, *supra*; *Coleman v. Ga. R. Co.*, *supra*; *Griswold v. Chicago, etc. R. Co.*, 36 N. W. 101; *Thompson on Car. Pas.* 49, § 7.

But a denial that the extreme responsibility contended for exists is not an affirmance of the rule that responsibility is restricted to wrongs that are willful or wanton. Such conclusion would rest upon the premise that one attending a passenger enters the car from curiosity or upon his own business under a mere license from the company, and not upon business connected with the company upon an implied invitation. If this premise be false and the converse correct, then, according to the decisions of this and other courts, the carrier would be bound to the exercise of ordinary care. *St. L. I. M. & S. R'y v. Fairbairn*, 48 Ark. 491; *Holmes v. N. E. R. Co.*, L. R. 4 Exch. 254 (1). And that it is so bound in cases like this is held in the cases first cited, as well as in others upon the subject. *Gillis v. Penn. R. Co.*, 8 Am. L. Reg. (N. S.) p. 729; S. C., 59 Penn. St. 129; *Griswold v. Chicago, etc. R. Co.*, *supra*. In our opinion the rule is correct upon principle. For it is a matter of common knowledge that, in the usual conduct of the passenger business, it often becomes necessary for those not passengers to go upon the cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. While it perhaps arose out of a consideration for

1. In *Holmes v. North Eastern R'y Co.* L. R., 4 Exch. 254 (Court of Exchequer, Trinity Term, 1869), it appeared that at defendant's station it was customary to unload coal wagons by shunting them and tipping the coal into cells. The consignees of the coal or their servants assisted in the unloading, and to do that it was necessary to walk along a flagged path by the side of the wagons. Plaintiff was the consignee of a coal wagon, which could not be unloaded in the usual way on account of all the cells being occupied; with permission of the station master, he

went to his wagon, which was shunted in the usual place, took some coal from the top of the wagon and descended to the flagged path. The flag he stepped on gave way; he fell into one of the cells and was injured. *Held*, that, although not getting his coal in the usual way, the plaintiff was not a mere licensee, but was engaged, with the consent and invitation of the defendants, in a transaction of common interest to both parties, and was, therefore, entitled to require that the defendant's premises should be in a reasonably secure condition.

the security and convenience of the traveler, it has proven beneficial to carriers, and now prevails in this State and extensively elsewhere, and is treated as an incident to the business in the conduct of the public and the acquiescence of carriers. It cannot be doubted that it has increased travel and the earnings of carriers, while it has promoted the convenience and security of passengers; and if it should be abrogated, many persons would be compelled to forego journeys, to the detriment of the carrier and their own inconvenience. We conclude that such attendant performs a service in the common interest of carrier and passenger, and that his entry upon a car is upon an implied invitation which entitles him to demand ordinary care of the carrier.

But although we think the attendant is entitled to demand ordinary care for his protection, and would be entitled to recover for an injury caused by its omission, still he could not recover unless he established that his injury was caused by some negligent act or omission on the part of the carrier. The word "negligence" implies a duty as well as its breach, and the fact can never be found in the absence of a duty. Assuming, then, that the plaintiff went upon the train to render necessary assistance to a female passenger and child, and that those in charge of the train knew that he was upon it, was it the duty of the defendant to hold the train the full length of time that was usually required for passengers to get off and on the cars at that place? The court charged the jury that it was, and this presents the controlling question upon this appeal.

We frequently find the statement of a rule that trains must be stopped a reasonable time for all passengers who desire to stop at the station to get off and outgoing passengers to get on, and when applied in a proper case, the rule is, no doubt, sound. But the rule is designed for the benefit of passengers only who desire to end or begin their journey, and cannot be invoked as a ground for recovery by other persons.

If one, intending to transact important business with a passenger, should be disappointed by reason of an unusually short stop, he could not invoke the rule, although a stop for the usual time would have benefited him greatly; nor could the passenger complain for the failure to stop, unless it was the station of his destination. And even as to passengers, the rule does not require

a stop for any usual, stated time, but only for a reasonable time to permit those who desire to stop to get off and outgoing passengers to get on. It is obvious that this time would vary, and that a stop which would be reasonable at one time, when there were but few desiring to get on or off, would be unreasonable at another when there were many; but it is the duty of passengers, when the train stops, to proceed with reasonable expedition to get off or on, as they desire, and if sufficient time for this purpose be given, the rule stated requires no longer stop, and the train may resume its progress. We do not think this rule can be invoked to sustain the plaintiff's claim. But one who goes upon the train to render necessary assistance to a passenger in conformity to a practice approved or acquiesced in by the carrier, in its interest and upon its implied invitation, as before stated, has a right to render the needed assistance and leave the car, and the railroad in permitting him to enter it with knowledge of his purpose is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. *Griswold v. Chicago, etc. R. Co., supra.*

But the duty is dependent upon the knowledge of his purpose by those in charge of the train; for without such knowledge, they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after allowing him a reasonable time to get aboard. The law could not in reason or justice impose as a duty the doing of that which, in the light of everything known to the trainmen, would not appear necessary or proper, nor hold that the cars should be stopped when there was no reason to stop them except a fact unknown to them. If the attendant intended to become a passenger, he had no reason to ask a continued stop; and if he desired to get off, and that alone made a longer stop necessary, he could not expect or ask that it be made where no occasion for it was known to those in charge. Even where a passenger desires to stop at an intermediate station he must make his desire known; and if he neglect this he cannot complain if he is carried past his station. *Griswold v. Chicago R. Co., supra; Coleman v. Ga. R. Co., supra.* If such notice is required of passengers, it should, with at least equal reason, be exacted of others, and we are of opinion that it is essential to fix a duty in that regard.

The court charged the jury that if the employees upon the cars offered to assist the woman and child to a seat and to care for their hand-baggage, the plaintiff had no right to enter the car, and the defendant owed him no duty except to refrain from willful or wanton injury to him. This was proper; for if the defendant's employees offered to perform that service there was no necessity for an escort, and the act of plaintiff in going on the cars was not done upon any implied invitation of the defendant.

The notice that all persons not having business with the company were positively forbidden to enter any of the defendant's cars would not apply to a person who attended a passenger to render needed assistance; if it does, it might be seriously questioned whether it would not be unreasonable and void where the company failed to furnish necessary attendants to render such assistance. Proof of the notice was immaterial, and proof of the custom on the part of the railroad employees was likewise immaterial, but harmless. (1)

Tested by the rule above announced, the court properly refused the second, fourth, sixth and seventh instructions asked by the defendant, and committed no error in modifying the fifth, eighth, and ninth; the appellee concedes that the third announced the law but contends that it was covered by other parts of the

1. The following is the notice referred to:

"SPECIAL NOTICE.—All persons not having business with the company are hereby positively forbidden to enter, sit, stand or walk upon the railroad, side tracks, turntables, right of way, depots, platforms, or to get upon or ride on any of the locomotives or cars of the Missouri Pacific Railway, leased and operated lines.

"And all such persons, whether children or adults, are hereby notified that they have no legal right to do such things, and that in every such case they are trespassers.

"All persons are hereby positively forbidden to enter or go in or upon any of the said places, or in or upon

any of the property of this company to transact their own private business of any and all kinds, and all such persons who disobey this order will be trespassers, and the laws applicable will be enforced against them. This applies particularly to hackmen, hotel runners, etc.

"The attention of parents whose children go about said places, or upon any of the property of this company, to play or to ride on the trains, or for any other purpose, is especially called to this order, and they are hereby required to keep their children away from the railroad, as in all such cases the children are not only greatly exposed to dangers, but are in law trespassers."

charge; we have, therefore, treated it as correct, and the court will see upon a re-trial that the charge given covers it.

The instructions for plaintiff all embody the principle that it was the duty of the defendant to stop the train the usual length of time for permitting passengers to alight and embark, regardless of defendant's knowledge that plaintiff wished to get off, and that the omission thereof might be the basis of a recovery; whereas, we hold that there was no duty to hold the train without such knowledge, and that, if the duty existed, it was to hold the train long enough to permit plaintiff to go on, assist the woman to a seat and then get off.

For the errors in charging the jury the judgment will be reversed and the cause remanded. As the evidence upon another trial may differ materially from that disclosed by the record, we have not determined whether it would justify a finding for the plaintiff; but lest our silence be misconstrued, we deem it proper to state that the judges have suggested doubts upon their part whether the plaintiff's own testimony did not establish such imprudence and recklessness upon his part in attempting to leave the train after it was in motion as would preclude a recovery, even if the defendant is shown to have been guilty of negligence.

KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY v. MAYES.

Supreme Court, Arkansas, January, 1894.

[Reported in 58 Ark. 397.]

JUMPING FROM SWIFTLY MOVING TRAIN CONTRIBUTORY NEGLIGENCE.—A passenger mentally sound, who, under no emergency or constraint, jumps in the dark at his station from a train moving between twelve and eighteen miles per hour, cannot recover for injuries received thereby.

APPEAL from Sharp Circuit Court.

Action brought by Ned Mayes against the Kansas City, Fort Scott & Memphis Railroad Company, to recover damages for personal injuries. The facts are stated by the court as follows:

Appellee sought to recover of appellant \$1,500 damages, caused, he says, by the negligence of its employees in refusing and failing to stop its train at appellee's destination, a station on

appellant's road, and by slowing up at the platform, thus inducing appellee to alight from the train while it was moving, causing him to receive severe injuries. Appellee was a passenger. Appellant denies, and says whatever injuries appellee received were the result of his own negligence. Appellee testified "that the train whistled about half a mile from depot; he heard the air brake go on; the train slowed up to about twelve miles per hour; he jumped off, and the frost on platform caused him to slip," etc.

One of his companions (who attempted to get off the same way and who, marvelously, escaped unhurt) says, "The rapid motion of the train when I jumped sent me *spinning through the air like a wheel*." The train was due at 7:27 A.M., and a witness said it was not light yet, "kind of dark."

The testimony of all the witnesses shows that the train was moving between twelve and eighteen miles per hour; none place the speed below twelve, and one as high as eighteen. The verdict and judgment were for \$250.

WALLACE PRATT and OLDEN & ORR, for appellant, cited: *Rosenberry v. R'y Co.*, 45 Ark. 256; *Catlett v. R'y Co.*, 57 Ark. 461; 43 Mo. App. 353; 23 Pa. St. 147; 9 La. Ann. 441; 41 Id. 795; 45 Ga. 289; 26 Ill. 373; 2 Wood's R'y Law, 1126; *Thompson Car.* 267; 14 S. W. Rep. 1099; 49 N. Y. 44.

SAM H. DAVIDSON, for appellee, cited: 46 Ark. 438; 46 Id. 423, 437; 54 Id. 29; 26 Ind. 459; 2 Wood's R'y Law, 1131.

Wood, J. (after stating the facts.)—It is not negligence *per se* to jump from a moving train. But where one, *compos mentis*, under no circumstances of emergency or constraint, takes "a leap in the dark" from a train moving at the rate shown in this case, his conduct is reckless and foolhardy. *St. Louis, etc. R. Co. v. Rosenberry*, 45 Ark. 256; *Catlett v. Railway Company*, 57 Ark. 461.

The learned circuit judge, upon appellee's own statement and the undisputed facts, might very properly have directed a verdict for appellant.

Reversed and dismissed.

**ST. LOUIS & SOUTHWESTERN RAILWAY CO.
V. JOHNSON.**

Supreme Court, Arkansas, May, 1894.

[Reported in 59 Ark. 122.]

INSTRUCTION THAT JURY SHOULD CONSIDER INTEREST OF WITNESSES IS ERRONEOUS.—In an action against a railroad company for injuries, a charge that the jury should consider the personal interest of the witnesses, without calling attention to the subject matter of their testimony also, is erroneous, but is cured by a further charge that the jury must not discredit any witness arbitrarily, nor discard or depreciate the testimony of witnesses merely because they are in the employ of the railroad company.

PASSENGER MAY ASSUME THAT HE CAN ALIGHT IN SAFETY AFTER NAME OF STATION IS CALLED AND THE TRAIN BROUGHT TO A STANDSTILL.—After the name of a station is called in the nighttime and the train brought to a standstill, a passenger is entitled to assume that he may alight in safety, and his failure to see a rapidly approaching train on a track that he had to cross on his way to the station is not contributory negligence as a matter of law, but the question should be left to the jury.

APPEAL from Columbia Circuit Court.

Action by Johnson against the St. Louis & Southwestern Railway Company. The facts are stated by the court as follows:

This appeal is from a judgment for \$1,250 recovered by appellee for a personal injury claimed to have been received through the negligence of appellant. Appellant admits the injury, denies negligence, and charges appellee with contributory negligence.

The court gave the following instructions at the request of plaintiff:

1. "The jury are instructed, as a matter of law, that a passenger at a station has a right to assume that the railroad company will not expose him to unnecessary danger, but will discharge its duty, which requires it to provide passengers a safe passage to and from its trains; and he is not, therefore, in all cases liable to the charge of contributory negligence because he attempts to cross an intervening track, made necessary by the running arrangements of said railroad, without looking for approaching trains."

2. "Railroads are required to exercise a great deal of care and diligence in taking care of their passengers, and to provide them a safe and convenient means of entrance and departure from their trains, and a failure to do this is evidence of negligence, and they are liable for all damage caused thereby, unless the passenger, by his own misconduct in failing to exercise ordinary prudence, directly contributes to such injury. And, in determining the question as to whether plaintiff, in this case, failed to exercise ordinary prudence, the jury will take into consideration all the facts and circumstances attending the injury, and that plaintiff had a right to presume that defendant had, in the exercise of due care, so regulated its trains that the intervening space which it was necessary for him to go over in order to reach the depot would be free from interruption by passing trains, and, from these and all the surrounding circumstances in evidence, determine the same."

3. "If the jury find, from the evidence in this case, that the plaintiff was a passenger on one of the cars of the defendant, and that, on arriving at his destination, the car on which he was riding was stopped on a side track on the opposite side of the main line from the depot, after said station has been called by defendant's employees, and that defendant permitted another of its trains to pass over said main line, at an unusual rate of speed, while plaintiff was passing over said main line, across which it was necessary to go in order to reach the depot, without any provision being made on the part of the defendant to avert danger, and that the plaintiff was damaged by defendant's train on account of said negligence and want of proper care, then they will find in favor of the plaintiff such an amount of damages as, in their judgment, based on the evidence, will be sufficient to compensate him for the injuries he has sustained, the pain suffered and the amount he has been compelled to expend on account of such alleged negligence, not exceeding the amount sued for."

4. "The jury are the sole judges of the facts, the weight of evidence and the credibility of witnesses. You should, if possible, reconcile any conflict in the evidence, but, if you cannot do this, then give credence to the witness or witnesses whom you believe most worthy of belief, and, in doing so, you are to take into consideration their interest in the matter, and their manner of testi-

lying. In determining whether or not an act is the proximate cause of an injury, the legal test is, was the injury of such a character as might reasonably, under the circumstances, have been foreseen or expected as the natural result of the act complained of?"

The following instructions were given for the defendant:

1. "If the jury find from the testimony that the plaintiff got on the track in front of and too near the approaching engine for the same to have been possibly stopped in time, that the whistle had been sounded and the bell rung, as is usual under such circumstances, they will find for the defendant."

2. "The jury are instructed that while they are the judges of the weight of evidence and the credibility of witnesses, yet they must not discredit any witness arbitrarily, nor are they to discard or depreciate the testimony of a witness merely because he is in the employ of the defendant company."

3. "The jury are instructed that one who is injured in attempting to cross a railroad track, even at a public crossing, ahead of an approaching train, cannot recover, even though the train approached at an unusual speed and without signals, if he either knew of the proximity of the train, or else failed to look and listen for it when he knew it was approaching, and if he had used his senses, he could not have failed both to hear and see it; and, if they find that such, substantially, was the situation and surroundings, and the conduct of the plaintiff on the occasion of his receiving the hurt complained of, they will find for defendants."

13. "If the jury find from the testimony that the plaintiff, a passenger on the train on the side track, alighted therefrom against the warning of the trainmen, they will find that he ceased to be passenger of his own accord, and cannot claim protection as such."

14. "If the jury find from the testimony that the usual signals were given on the approach of the train, and that plaintiff got on the track too near to stop the train in time to prevent the accident, they will find for the defendant, if they further find from the testimony that plaintiff was in possession of his senses of seeing, hearing and understanding, and by exercise of them could have avoided the injury."

BUNN & GAUGHAN and SAM H. WEST, for appellant, cited: 88 Ala. 538; 95 U. S. 697; 48 Ark. 106; 46 Id. 528; 54 Id. 25; Ib. 431; 37 Am. & E. R.R. Cases, 172; 39 Id. 463; 50 Id. 32; 40

La. Ann. 800; 34 Ark. 613; 48 Id. 106; 19 S. W. Rep. 432; 49 Am. & E. R.R. Cases, 405.

THORNTON & SMEAD, for appellee, cited: 48 Ark. 106; 46 Id. 196; Beach, Cont. Neg. 171, 172; Cooley on Torts, 694; Hutch. Car. § 516; Whitt. Smith on Neg. 317, 318; 2 Redf. Law of Rail. 233; 1 Rorer on Rail. 479; 2 Id. 1131; 4 A. & E. Enc. Law, 908; 26 N. J. Eq. 474; 64 N. Y. 635; 11 Hun, 395; 11 Minn. 277; 2 McLean, 257; 8 Pa. St. 479; 13 Pet. 192; 51 Ga. 583; 96 Ind. 346; Thomp. on Car. 268, par. 4, 233, par. 18; 15 Am. Rep. 640; 18 S. W. Rep. 5; 54 Ark. 159; *Ib.* 431; Ray, Neg. Imposed Duties, 121; 11 Minn. 178; 84 N. Y. 240; 60 Md. 449; 100 Mass. 208; 104 Id. 108; 105 Id. 203; 33 Fed. Rep. 796; 22 S. W. Rep. 232; 38 N. J. L. 133; 66 N. Y. 642; L. R. 7 C. P. 321; 50 Ark. 545; 52 Id. 45; 48 Id. 121; 13 Id. 317; 35 Id. 594; 46 Id. 152.

Wood, J. (after stating the facts).—Appellee shows that he was a passenger on appellant's train; that, on approaching Walden, his destination, the name of the station was announced, the whistle sounded, the bell rung, and the train stopped nearly opposite the depot. Appellee supposed the train had stopped to allow passengers to get off; and, accordingly, he, following several other passengers, proceeded to debark. No notice was given that the train had side-tracked to allow a belated train to pass. No warning of danger was given, or injunction to the passengers to remain seated until the other train should pass. Appellee was fifty-four years old. It was between nine and ten o'clock at night, and very dark to him as he came out of the brightly lighted coach. The train from which he debarked was making much noise, the bell ringing, steam escaping, and air-brakes making sound. As appellee reached the ground, he looked across to the depot, and started toward the platform. About the time he got upon the main track, he discovered, for the first time, within a few feet of him, the headlight of the south-bound engine, but it was then impossible for him to get out of the way. The train was running fifteen or twenty miles per hour. The bell of this engine was not ringing. Appellee was run over, and his foot so mangled as to necessitate amputation. This is the case which appellee makes by his own evidence and that of his son, and, in some respects, his testimony is corroborated by other witnesses.

The appellant, on the other hand, shows that the passengers were notified that the train had side-tracked to allow the south-bound train to pass, and were requested to remain seated until the train should be backed up to the depot platform on the main track. That the whistle was sounded and bell was ringing on the engine that did the injury. Train was running three or four miles per hour. Appellee could have seen and heard it had he looked and listened, and was notified, even after he got upon the main track, in ample time to have escaped, had he not negligently failed to do so. We are asked, upon this state of the contention, to review the verdict of the jury. It is impossible for the appellate court to bring truth out of so much palpable contradiction. That was the province of the jury and the trial judge. To us it appears, from the number of the witnesses, and the logical and reasonable conclusions to be drawn from their testimony, that the preponderance was decidedly in favor of appellant on the facts. But preponderance is not determined by numbers alone. The circuit judge, having refused to set aside the verdict, indicates that he regarded the finding of the jury as just and correct. There was certainly evidence sufficient to support the verdict.

The charge of the court in the first part of the fourth instruction was not correct, in that it permitted the jury, in weighing the evidence, to regard the mere personnel of witnesses, rather than the subject matter of their testimony, when both should be considered. But whatever defect there was in this particular was cured by the second prayer given at the instance of appellant, in which the court told the jury "that they must not discredit any witness arbitrarily, nor discard or depreciate the testimony of witnesses merely because they were in the employ of the defendant company."

As to other instructions, it is sufficient to declare what the law is upon the question involved, without commenting upon them separately. This court, in *Railway Co. v. Cullen*, 54 Ark. 431, held "that a traveler upon the highway is bound to exercise ordinary care and diligence at the intersection of a railway, to ascertain whether a train is approaching, in order to avoid collision with it. . . . A failure to look and listen is, therefore, evidence of negligence on his part." Such is the general rule, as settled by the authorities, enjoining a positive duty of

care upon those who would pass over a railroad track to look and listen. A failure to take such precaution before attempting to pass over is negligence. *Casey v. Canadian Pac. R. Co.*, 37 A. & E. R. Cas. 172; *Penn. R. Co. v. Beale*, 23 P. F. Smith, 504; *Nagle v. Allegheny Valley R. Co.*, 88 Penn. St. 35; *Penn. R'y Co. v. Matthews*, 7 Vroom, 531; *Gratiot v. Mo. Pac. R. Co.*, 49 A. & E. R. Cas. 398.

But where trains have stopped at stations for the purpose of allowing passengers to make their entrance and exit, the rule is different. The very fact that the name of the station has been called, and the train brought to a standstill soon thereafter at the station, is tantamount to saying to the passenger, "The way is open, and you may alight in safety." The duty of the passenger, under such circumstances, is not the positive one of first ascertaining whether there is danger ahead, before he undertakes to get on or off the train, as the case may be, because he may act upon the implied assurance that all obstructions and interruptions of a dangerous character have been removed. In other words, he may assume that the railroad company has done its duty to provide him safe landing. *B. & O. R. Co. v. State*, 60 Md. 449; *Phila. etc. R. Co. v. Anderson*, 20 Atl. Rep. 2; *Columbus, etc. R. Co. v. Farrell*, 31 Ind. 408; *Bridges v. R'y Co.*, L. R. 6 Q. B. 377 (1); *Lewis v. R'y Co.*, L. R. 9 Q. B. 66 (2); *Hutchinson on Carriers*, § 616; *Klein v. Jewett*, 26 N. J. Eq. 474; *Memphis & Little Rock R. Co. v. Stringfellow*, 44 Ark. 322, and cases there cited, as to effect of announcing name of station; see, also, *Terre Haute, etc. R.R. v. Buck*, 96 Ind. 346, as to implied invitation to alight; also, *Smith v. R'y Co.*, 88 Ala. 538.

As was said in *Brassell v. N. Y. C. & H. R. R.R. Co.*, 84 N. Y. 24, "A passenger, when taking or leaving a railroad car at a station, has a right to assume that the company will not expose him to unnecessary danger; and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers to provide them a safe passage to and from the train." *Terry v. Jewett*, 78 N. Y. 338; *A. T. & S. F. R'y Co. v. Shean*, 18 Colo. 368.

1. See note on p. 41, *ante*, for the facts of this case.

2. See note on p. 117, *ante*.

The passenger may act upon such reliance. He is not required to look out for and anticipate danger, as in the case of one, not a passenger, crossing at a public crossing or elsewhere. His alertness may be lessened by the implied invitation of the company to alight, and he may fail to take the precaution which would be demanded of him under other circumstances. But the duty of the railroad company will not relieve the passenger from the exercise of ordinary care in avoiding an actual, obvious or known danger, or excuse any reckless conduct on his part. Even the grossest negligence of the company would not justify recovery, if the passenger, under all the circumstances of the injury, is shown to have been guilty of contributory negligence. *Rose v. N. E. R'y Co.*, L. R. 2 Ex. Div. 248 (1); *Whittaker's Smith on Neg.* 314; *Archer v. N. Y. etc. R. Co.*, 106 N. Y. 589; *Chaffee v. Boston & L. R. Co.*, 104 Mass. 108.

In *Balt. & O. R. Co. v. State*, 60 Md. 462, it is stated: "In each case the special facts and circumstances must be considered and their bearing upon the propriety of the conduct of the party injured, except where the facts are clear and undisputed, must be submitted to the jury for their consideration. . . . And, in considering the facts, the question of ordinary care on the part of the party injured is not to be determined in an abstract way, but relatively as it may be connected with and dependent upon the duty and obligation of the defendant." *Penn. R. Co. v. White*, 88 Penn. St. 327; *Gaynor v. Old Col. etc. R'y Co.*, 100 Mass. 208; *Robostelli v. N. Y. etc. R. Co.*, 33 Fed. Rep. 796.

The question of the negligence of the company and of the appellee was submitted in this case upon instructions even more liberal to appellant than were justified by the authorities. Those given for appellee are not strictly correct, in that they lose sight

1. The facts in *Rose v. North Eastern R'y Co.*, L. R. 2 Exch. 248 (Court of Appeal, Exchequer, December, 1876), are as follows: A railway train drew up at the station with two of the carriages beyond the platform. The servants of the company called out to the passengers to keep their seats, but were not heard by the plaintiff and other

passengers in one of the carriages. After waiting some little time, and the train not having put back, the plaintiff got out, and in doing so fell and was injured, for which injury she brought an action against the company. *Held*, reversing the decision of the Exchequer Division, that there was evidence of negligence on part of the defendants to go to the jury.

of the theory presented by appellant—that appellee knew the train had side-tracked, was warned of danger, and consequently was negligent in going where he did. But when taken in connection with those given for appellant, especially the thirteenth as modified by the court, they state the law substantially as above declared. The court did not err in refusing the fourth and sixth for appellant, nor in any of the modifications it made to instructions asked on its behalf.

The judgment of the Columbia Circuit Court is therefore affirmed.

WHEATON v. THE NORTH BEACH AND MISSION RAILROAD COMPANY. (1)

Supreme Court, California, January, 1869.

[Reported in 36 Cal. 590.]

DAMAGES—WHEN NOT EXCESSIVE.—The law does not prescribe any fixed rule of damages in actions for personal torts, but leaves their assessment to the unbiased judgment of the jury, and a verdict will not be disturbed on a motion for a new trial unless the amount is so large as to induce a reasonable person upon hearing the circumstances, to declare it excessive or as to suggest, at first blush, passion or prejudice or corruption on the part of the jury. A verdict for \$2,000 for a broken arm is not excessive.

DUTY OF CARRIERS.—Passenger carriers bind themselves to carry safely those whom they take into their coaches or cars, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons.

THE SAME—INSTRUCTIONS.—The court refused to give the following instruction: “The rule that passenger carriers are to be held to the exercise of the strictest diligence, is not to be understood by the jury as requiring of such carriers those particular precautions, as it is apparent *after* the accident might have prevented the injury.” *Held*, no error.

ALIGHTING FROM MOVING CAR—WHEN NOT NEGLIGENCE.—A passenger who attempts to leave a street railway car while it is standing still without first notifying the conductor and in his view, is not guilty of negligence, and if the car is started while the passenger is in the act of alighting and the passenger is thereby injured, the company will be liable.

1. Cited in *Lee v. S. P. R. Co.*, 101 Cal. 118, 121.

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

Action by plaintiff, a passenger on one of defendant's cars, to recover damages for personal injuries sustained by reason of the alleged negligence of defendant's servants in starting the car in motion while plaintiff was alighting, and before she was free therefrom, whereby she was thrown down and her left arm broken. Plaintiff had verdict and judgment for \$2,000. Defendant moved for a new trial, which was denied, and appealed from the judgment and the order denying a new trial. The facts appear in the opinion.

J. G. MCCULLOUGH and W. W. CRANE, for appellant, cited: *Boyce v. Cal. Stage Co.*, 25 Cal. 470; *Smith v. N. Y. C. R.R. Co.*, 24 N. Y. 224; *Bowen v. N. Y. C. R.R. Co.*, 18 N. Y. 410.

H. J. TILDEN, for respondent, cited: *Smith v. N. Y. C. R.R. Co.*, 24 N. Y. 224; *Hegeman v. Western R.R. Corp.*, 13 N. Y. 24; *Fecken v. Jones*, 28 Cal. 627; 2 Greenl. Ev. § 222.

Sanderson, J.—The motion for a new trial was made upon three grounds: First—Excessive damages. Second—Insufficiency of the evidence. Third—Error in refusing an instruction asked by the defendant.

1. In cases of this character, as we had occasion to say in *Aldrich v. Palmer*, 24 Cal. 513, the law does not prescribe any fixed or definite rule of damages, but, from necessity, leaves their assessment to the good sense and unbiased judgment of the jury, and hence their verdict will not be disturbed on motion for a new trial, unless the amount is so large as to induce a reasonable person, upon hearing the circumstances, to declare it outrageously excessive, or as to suggest, at the first blush, passion, or prejudice, or corruption on the part of the jury.

The case shows that the injury sustained by the plaintiff, according to the uncontradicted testimony of her physician, was a fracture of the ulna, or large bone of the left arm at the wrist, accompanied by a displacement of the ligatures of the wrist, causing the radius, or small bone, to drop down so that the knuckle, or prominence usually seen on the back or outward side of the wrist, now appears upon the front or inward side, and that the radius will never come back to its place, although it may, after a long time, in a measure, become used to its new place;

that the fracture was accompanied with violent inflammation and pain, which had not ceased at the time of the trial—nearly seven months after the injury was received—and would not for months to come; that the wrist will never be as sound as before.

This shows not only a serious and painful injury which prevented the plaintiff, according to her testimony, from doing any work up to the time of trial, except “a little light sewing,” and might do so for an indefinite time to come, but it also shows a permanent disfigurement, and a serious and permanent injury. In view of such consequences, we think no reasonable man would pronounce a verdict for \$2,000 so excessive as to suggest either passion, prejudice, or corruption on the part of the jury.

2. The testimony is claimed to have been insufficient in two particulars only: First, because it does not appear that the plaintiff gave any signal to the conductor to stop the car. Second, because when asked by the conductor if she wished to leave the car, she made no answer.

a. The case shows that she was on the point, or in the act of raising her hand to give the signal at the same time a signal was given by another passenger, but whether she gave the signal or not is a matter of no consequence whatever. Her injury did not result from a failure on the part of the conductor to stop the car, but from his starting it while she was in the act of descending. He had stopped the car at the signal of Mr. Gunnison, and the desire of the plaintiff to leave the car was sufficiently indicated by her rising and following Mr. Gunnison and wife to the door.

b. To attach any importance to the fact that she failed to answer the conductor when asked if she wished to leave the car, we must assume that the car had started before she attempted to leave it. If the car had started after Mr. Gunnison and his wife had descended, and before the plaintiff had commenced, or was on the point of descending, she was negligent in not telling the conductor that she wished to get out, and in not waiting until he had stopped the car before attempting to do so. But this state of the case is sustained only by the testimony of the conductor and is contradicted by the testimony of the plaintiff and Mr. and Mrs. Gunnison. Whether the case made by the conductor or the case made by the plaintiff and Mr. and Mrs. Gunnison was the true one was for the jury to determine, and we think they

determined it in accordance with the preponderance of the testimony, and not against it.

3. The instruction which the court refused was in these words: "The rule that passenger carriers are to be held to the exercise of the strictest diligence, is not to be understood by the jury as requiring of such carriers those particular precautions as it is apparent *after* the accident might have prevented the injury."

This instruction was designed, as we are informed by counsel, "to tell the jury that the prudence and foresight required was such as would be exercised by a cautious man before an accident and without knowledge that it was about to occur; that the jury were not to understand the rule to be that, if they, having heard all the circumstances of the accident, would now look back and see that some other course of conduct would have prevented the accident, the defendant must be considered as being in the wrong because it failed to adopt such conduct or take such precaution."

Passenger carriers bind themselves to carry safely those whom they take into their coaches or cars, as far as human care and foresight will go, that is, for the utmost care and diligence of very cautious persons. Story on Bail. § 601. Whether in case of injury they have exercised such care and diligence, is to be determined in view of the facts and circumstances which existed at and prior to the accident, and they cannot be held not to have done so because, after the accident, it may appear that it could have been avoided by precautions which a very cautious person, not knowing that the accident was about to occur, would have not taken. But this form of expressing the rule is not more clear to our comprehension than the bare statement that the carrier must exercise the utmost care, diligence, and foresight of a very cautious person. The words, "care, diligence, and foresight" imply a relation to future events, for no amount of care, diligence, or foresight can avoid an event which has already happened. When it has been said that it is the duty of the carrier to exercise the utmost care, diligence and foresight of a very cautious person, it is very difficult to add anything, by way of further precision or clearness, and whoever undertakes it will be quite as likely to reach the opposite result as the one intended. Whatever can be added can, at best, be only a paraphrase of what has been already said with clearness and precision sufficient to answer all the calls of the dull-

est comprehension. Assuming, then, that the instruction means what is claimed for it, and nothing more, we are not prepared to say that the court's refusal to give it was error.

But we are unable to understand the instruction as meaning only what counsel say it was intended to mean. We understand it as meaning something more. We understand its meaning to be, that the carrier is not required to adopt those particular precautions which, as it appears after the accident, might have prevented the injury, had they been taken. It certainly means that, if it means anything. It means more, then, than counsel intended. It means that the defendant was not bound to adopt those particular precautions which, as it is now apparent, would have prevented the injury—which is to say, that the defendant is not bound to adopt any precautions whatever, particularly those which would have prevented the injury. We think the language of the instruction not only bears this construction, but admits of no other. If we are right in this, counsel will readily perceive the truth of the suggestion made above, that it is not easy to make that clearer which is already clear, and that he who undertakes the task is quite as likely to reach the opposite result.

Judgment and order affirmed, and remittitur directed to issue forthwith.

MCQUILKEN v. THE CENTRAL PACIFIC RAILROAD COMPANY. (1)

Supreme Court, California, July, 1875.

[Reported in 50 Cal. 7.] (2)

CONTRIBUTORY NEGLIGENCE IS A MATTER OF DEFENSE.—

In an action for injuries sustained by a passenger, a child three years old, by being thrown under a car by its sudden forward movement through the alleged negligence of the employees of the railroad company, the contributory negligence of the plaintiff was a matter of defense to be proved by the defendant, and an instruction that the burden was on the plaintiff to show due care was erroneous.

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| <p>1. Cited in <i>Magee v. N. P. C. R. Co.</i>, 78 Cal. 430, 433; <i>Nagle v. S. P. R. Co.</i>, 88 Cal. 86, 91, 2 Am. Neg. Cas. 191.</p> | <p>2. The second appeal is reported in 64 Cal. 463, 2 Am. Neg. Cas. 176.</p> |
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APPEAL from the District Court, Third Judicial District, County of Alameda.

Plaintiff, who was an infant three years old, in charge of her mother, in August, 1870, took passage on the railroad of defendant at the Broadway station in Oakland, to ride to the Market street station. The train stopped at the latter station, and the mother had reached the middle step leading from the platform of the car to the ground, when the car started. Plaintiff was standing on the platform, and by the movement of the car was thrown forward and fell between the cars and sustained such injuries as necessitated the amputation of a foot. On the trial, the defendant sought to prove contributory negligence on the part of plaintiff's mother. The testimony as to such negligence was conflicting. The jury, under the instructions of the court, found a verdict for defendant. Plaintiff appealed from the judgment, and from an order denying a new trial. The facts appear in the opinion.

Z. MONTGOMERY, for the appellant, cited: *May v. Hanson*, 5 Cal. 360; *Finn v. Vallejo St. Wharf Co.*, 7 Cal. 265; Code Civil Pro. § 1963; *Durant v. Palmer*, 5 Dutch. 544; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *Flynn v. S. F. & S. J. R.R. Co.*, 40 Cal. 14; *Grant v. Moseby*, 29 Ala. 302; *Brooks v. Buff. & N. F. R.R. Co.*, 25 Barb. 300.

S. W. SANDERSON, for the respondent, cited: *Flower v. Adam*, 2 Taunt. 314; *Butterfield v. Forrester*, 11 East, 61; *Harlow v. Humiston*, 6 Cow. 189; *Smith v. Smith*, 2 Pick. 621; *Lane v. Crombie*, 12 Id. 176; *Carsley v. White*, Ib. 254; *Adams v. Carlisle*, 21 Id. 146; *Parker v. Adams*, 12 Metc. 415; *Lucas v. Taunton R.R. Co.*, 6 Gray, 64; *Wilson v. Charlestown*, 8 Allen, 138; *Merill v. Hampden*, 26 Me. 234; *Dickey v. Maine Tel. Co.*, 43 Id. 492; *Park v. O'Brien*, 23 Conn. 339.

McKinstry, J.—The judge charged the jury: "If the want of care of plaintiff contributed to the accident she cannot recover. Proof in some form that the plaintiff did not contribute to the injury constitutes part of the plaintiff's case." And again: "The burden of proof is on the plaintiff to show that she was, at the time of the accident in question, in the exercise of due care." In *Robinson v. W. P. R.R. Co.*, 48 Cal. 426, we held that negligence on the part of plaintiff, in cases like the present, is a matter of defense to be proved by defendant.

This ruling does not preclude the trial court from directing judgment by way of nonsuit, whenever the evidence introduced by plaintiff so conclusively establishes a defense as that the court would grant a new trial in case of a verdict in his favor upon like evidence.

Order denying new trial reversed and cause remanded for new trial.

WALLACE, Ch. J., did not express an opinion.

SPEARMAN ET AL. V. CALIFORNIA STREET RAILROAD COMPANY.

Supreme Court, California, January, 1881.

[Reported in 57 Cal. 432.]

CREDIBILITY OF WITNESSES IS A QUESTION FOR THE JURY.—

Evidence that the sudden and violent starting of a dummy car caused a passenger who was getting on to lose his hold, whereby he was thrown under the dummy and killed, and that the driver of the car at the time was looking at the conductor, who had just come out of a store and called out "All right," although contradicted by a number of other witnesses, is sufficient to sustain a verdict for the plaintiff.

APPEAL from a judgment for plaintiffs, and an order denying a new trial, in the Fifteenth District Court, City and County of San Francisco.

Action brought by the widow and children of Frank Spearman for damages resulting from the death of the latter, alleged to have been caused by the negligence of the defendant. The facts appear in the opinion.

J. E. FOULDS, for appellant.

ALEX. CAMPBELL, MILTON ANDROS and CHARLES PAGE, for respondents.

The Court.—The principal point relied on by the appellant is, that the evidence does not show that the deceased came to his death by reason of the negligence of the defendants, or its agents, but by his own fault. While it is true that there is a good deal of testimony in the record going to show that the latter was the true cause, it is also true that there is testimony to the contrary. Thus: "James A. Garrett, being sworn, testified: I am an engineer in the employ of the Clay Street Railroad, and have been

an engineer since I was fourteen years old, most of the time in England. I am acquainted with the manner of running street railroads. Did not know Frank Spearman in his life. He was killed by dummy No. 5, at Fillimore Street. I was present. It was at the terminus. No. 5 was on the stand ready to start, and I was on No. 7; No. 6 and the car attached stood between me and No. 5, on the north track; No. 5 was on the south track. When I arrived, I did not see anyone around No. 5, and went down from my dummy around No. 5, and into the saloon on the southeast corner of California and Fillimore streets. There I saw the conductor and driver of No. 5 in the saloon. I asked the conductor if they were going on, and said that they were behind time, and told them to go on.

"The driver (Mr. Hoag) left the saloon and got on his dummy. The conductor went to the lunch table and took some lunch, and then rushed to the door. When he got to the door, he said, 'All right,' with his mouth full of meat. Hoag was standing with his hand on the lever, looking at the saloon door, and when Matthews came out, he pulled the lever. The dummy then 'surged' ahead. Deceased had his foot on front step, on the inside of the dummy. The surging of the dummy whirled him round. He tried to recover himself, and fell in front, underneath the dummy. I rushed out to where the dummy was. It took less time than it takes to tell it. Before the dummy started it stood opposite to the saloon. When the driver pulled the lever, he was looking at the door of the saloon and did not see the man getting on. The reason I went down was because No. 5 was behind time, and I had been down several times during that day to help him, because he had lost his hold of the rope which propelled the cars. I had only known Hoag as a driver for a few days previously. I did not think he was competent. He had several accidents, missing his rope. It happened more frequently with him than any of the rest. I worked on a railroad of this description over a year. Helped to start the Clay Street Railroad and went on their dummy as a driver; then went on the California Street Railroad, and helped to fix the tracks up and fix the dummies. At the time of the accident I had driven a dummy something similar to this one for about six months on the Clay Street Railroad, the difference between them being that the one works with a lever and the

other with a wheel; and I acted as dummy driver on the California Street Railroad from the time it started, commencing work for that company on the second week in February, 1878, and working up to the last week in August. Consider myself an expert. I did not consider Hoag a competent driver, from his way of handling a dummy. He jerked on the rope and stopped and started quickly. This caused the dummy to surge ahead when starting; and when stopping, to stop too quickly. This would have the effect of jerking people about on the dummy and throwing them backward and forward, making the dummy jump. The proper way to start a dummy is to start it easily, taking the grip slowly, and the friction of the rope passing through the dies will carry it along. I saw Hoag at that time jerk the rope when he started; that the dies came down solid on the rope, and the dummy 'surged' ahead, rolling and jerking the passengers backwards and forwards. This was caused by his pulling the lever suddenly on. The conductor's business is to start the cars. There was no car on No. 5 dummy. They were running a car with each alternate dummy. No. 6 had a car, and No. 7 did not. When the deceased was taken from under the dummy, he appeared to be crushed across the chest, and lay helpless. I called to a boy there to fetch Matthews (the conductor of No. 5) and Dr. Humphreys; but Dr. Humphreys was there, and stated who he was. I then said to him, 'See what you can do for this man, and the company will pay all the damages.' He said the man was dead. I attribute the man's death to the sudden 'surge' ahead of the dummy. It threw him around on the front dashboard."

The material parts of the testimony of this witness were contradicted by that of a number of other witnesses; but the credibility of the witnesses was a question for the jury, and is not for us. We have read the record carefully, and find in it sufficient testimony, if true, to sustain the verdict. All of the instructions asked for by the defendant were given, but with a modification, to which objection is made, not because it is not sound law, but because it is claimed there was no evidence to which it applied. In this, however, counsel are mistaken. The case was fairly put to the jury by the court below, which, upon evidence substantially conflicting, returned a verdict for the plaintiff.

Judgment and order affirmed.

MACDOUGALL v. CENTRAL RAILROAD CO. (1)

Supreme Court, California, May, 1883.

[Reported in 63 Cal. 431.]

CONTRIBUTORY NEGLIGENCE IN ALIGHTING FROM CAR—CHARGE OF COURT.—Contributory negligence on the part of a plaintiff is matter of defense, and in an action for injuries received by being thrown from a car while in the act of alighting therefrom, through the alleged negligence of the railroad company in suddenly starting the car, an instruction to the jury that the burden of proof is on the plaintiff to show that the injury resulted from the negligence of the company, without any contributory negligence on her part was erroneous.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order refusing a new trial.

At the time of the alleged injury, the plaintiff was a passenger on a railroad owned and operated by the defendant in the city and county of San Francisco. The facts appear in the opinion.

CRITTENDEN & MOSES, for appellant.

GUNNISON & BOOTH, for respondent.

Per Curiam.—The case was submitted to the jury, on the part of the plaintiff, upon the plaintiff's testimony and that of a medical gentleman, who described the injuries she had sustained. The verdict was for the defendant, and, as there was at least a substantial conflict in the evidence introduced by plaintiff and defendant respectively, we cannot say the verdict was not justified by the evidence.

The first two of the points urged by the appellant are:

1. "The court erred in instructing the jury that the burden of proof of establishing her case is on the plaintiff, and she must show, 'that the injury resulted from the negligence of the defendant *without any contributory negligence upon her part.*'"

2. "The court erred in instructing the jury, that 'plaintiff, if negligent, could not by her own negligence cast upon the person in charge of defendant's car the necessity of exercising extraordinary care and skill.'"

With respect to these instructions, we may remark, first, the burden of proof was on the *defendant* to show plaintiff was guilty

1. Cited in *Smith v. Occidental, etc. S.S. Co.*, 99 Cal. 462, 468.

of contributory negligence, unless plaintiff had already shown such negligence; and, second, if plaintiff was guilty of no negligence, still defendant was bound to exercise a great degree of care and skill. *Robinson v. W. P. R.R. Co.*, 48 Cal. 426; *Nehrbas v. C. P. R.R. Co.*, 62 Cal. 320.

The portions of the charge above recited were specifically objected to by plaintiff's counsel as follows: "Another (ground of objection) is that the instruction as to casting upon the driver extraordinary care or vigilance by reason of negligence, if the jury should suppose any such thing on the part of the plaintiff, is likely to mislead the jury in regard to the question of the degree of extraordinary care and diligence required on the part of the defendant in conveying and letting the plaintiff off the car. Another is that the instruction as to the burden of proof being upon the plaintiff, and that the plaintiff is required to show that the injury complained of resulted from the negligence of the defendant, without any contributory negligence on her part, is not law, and is ambiguous and calculated to mislead the jury."

The court had charged the jury: "The law imposes upon the defendant the duty of exerting and using the *utmost* care, foresight, diligence, and skill in the selection and employment of a driver for its cars, and in the management, driving, and stopping of said car, and in the taking in and letting out of said car of passengers for hire." And had also read to the jury from section 2100 of the Civil Code: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a *reasonable* degree of skill."

We would hesitate to order a new trial if the only error complained of were the charge, "Plaintiff, if negligent, could not by her own negligence cast upon the person in charge of defendant's car the necessity of exercising extraordinary care and skill." It is true, it would be difficult to distinguish between "extraordinary" and "utmost" care and skill. It is also true the language employed suggests that if a plaintiff is not guilty of contributory negligence he cannot recover if a defendant has used a degree of care and skill somewhat less than extraordinary or utmost. But if plaintiff was guilty of negligence, directly contributing to the injury—amounting to want of ordinary care—she

ought not to recover. The language of the court, therefore, while it gave a wrong reason for the rule, might, perhaps, be construed as a statement, that, if guilty of contributory negligence, the jury should find against her. We might, *perhaps*, say, in view of the other charges, to the effect that defendant was responsible for any want of the utmost care, that the charge complained of could not have misled the jury.

But however this may be, the charge, "the burden of proof of establishing her case is on the plaintiff, and she must show that the injury resulted from the negligence of the defendant, without any contributory negligence on her part," was clearly erroneous. *Robinson v. W. P. R.R. Co.* ; *Nehrbas v. C. P. R.R. Co.*, *supra*. Of course, the circumstances, as related by the plaintiff's witnesses, will often satisfy the court or jury that plaintiff has been guilty of such contributory negligence as will prohibit a recovery. But whether the evidence on the part of a plaintiff establishes contributory negligence is a question of fact for the jury, unless it is so clearly established as to justify the court in granting a nonsuit.

In the case before us, it might be argued upon the evidence that, if the plaintiff—as the only witness—was to be believed, she clearly proved she was guilty of no contributory negligence, and therefore the charge that the burden of proof was upon her to establish the negative could have done her no harm. But to assume that the case, as made by plaintiff, established she was guilty of no negligence, would be to take the fact in that regard, and so far as her evidence was concerned, from the jury ; and would have justified a charge that, if the jury believed her testimony, they should find her guiltless of contributory negligence. The defendant might well complain of such a charge and insist that her own testimony, bearing upon the question whether she was guilty of the degree of negligence which should prevent a recovery, ought to go to the jury, to be weighed and canvassed by them. An extremely cautious person might have retained her seat, or remained entirely within the car, until the woman who, as she testifies, preceded her, had reached the pavement. Although, if called upon to decide the *fact*, we might be of opinion that, by doing what she says she did, she was guilty of no negligence, we cannot say that the jury would have found that she proved herself guiltless of negligence. The jury might have found that

her evidence showed negligence on the part of defendant, but failed affirmatively to establish an absence of fault on her own part.

It must be admitted that the charge was erroneous, and we cannot declare, as matter of law, that it could not have misled the jury.

Judgment and order reversed and cause remanded for a new trial.

MCQUILKEN v. THE CENTRAL PACIFIC RAILROAD COMPANY. (1)

Supreme Court, California, January, 1884.

[Reported in 64 Cal. 463.] (2)

ALIGHTING FROM MOVING CAR—CONTRIBUTORY NEGLIGENCE A DEFENSE.—A child about three years of age, while alighting with her mother from a railroad train, at a regular station, where the train had stopped to take on and let off passengers, was injured by the starting of the train. There was a platform for the use of passengers on one side of the track, and although the train was longer than it, the car upon which the plaintiff and her mother were riding was alongside the platform when the train stopped. The place was known to the mother and she knew of the existence of the platform and its purpose, but to get off the train she went to the side opposite the one next the platform and was about alighting when the train started and the plaintiff was thrown under the train and sustained the injuries. The persons in charge of the train were not aware of the movements of the plaintiff and her mother or of their intention to get off, as a lookout was only kept on the side of the train next the platform. There was some evidence that the end of the car next to the platform where the plaintiff and her mother attempted to get off was obstructed by other passengers, and the testimony was conflicting as to how long the train stopped. A nonsuit was asked for on the ground of contributory negligence on the part of the mother for attempting to alight on the wrong side of the train, but the motion was overruled and this court *held* that the ruling was proper.

ALIGHTING ON WRONG SIDE OF PLATFORM—INSTRUCTIONS TO JURY.—It was error for the court to instruct the jury that the contributory negligence of the mother in attempting to alight on the side

1. Cited in *Glascok v. Cent. P. etc. R. Co.*, 73 Cal. 141.

Distinguished in *Bank of Savings v. Murfey*, 68 Cal. 463.

2. For the report of the former appeal, 50 Cal. 7, see p. 168, *ante*.

of the train not next the platform was a defense to the action, provided the train stopped long enough to enable the mother and child to land upon the platform.

APPEAL from a judgment of the Superior Court of the County of Alameda, and from an order refusing a new trial. The facts appear in the opinion.

COPE & BOYD, for appellant.

MONTGOMERY & MARTIN, for respondent.

Per Curiam.—1. We cannot say that the court below ought to have granted a nonsuit on the ground that plaintiff's evidence showed the negligence of the mother of the infant plaintiff proximately contributed to the injury. The position of defendant's counsel is that where a railroad company has provided a platform on one side of its track, on which passengers may alight, an attempt of a passenger to get off on the other side is negligence *per se*. We think that the fact, if proved, that the mother of plaintiff attempted to alight on the side where there was no platform is to be taken in connection with the other physical conditions proved; the question whether she was guilty of contributory negligence to be determined by the jury upon all the evidence bearing on that question.

The act or omission on the part of a plaintiff, claimed to have contributed to the injury, must have direct relation to the act or omission charged to be negligence on the part of a defendant. Whether the attempt to get from the platform at the rear of the car to the ground was, under the circumstances proven, negligence, and whether such negligence was to any extent an immediately concurring cause of the injury, were matters to be decided by the jury.

The cases cited by appellant do not sustain its position, in view of the facts proved in this case. In *Penn. R.R. v. Zebe*, 33 Pa. St. 318, it appeared that a passenger got off "on the wrong side" and stepped upon another track, where he was injured by a moving train. There was a platform on each side of the tracks within the depot; the trains frequently met at that point. It was said that the passenger who voluntarily got off his car and on the track on the inner side could not recover in an action against a railroad company, unless there was gross negligence on the part of the latter in permitting the passenger thus to leave the car.

The question did not arise upon nonsuit, but upon a request of the trial court to declare the law or "state the point," that if the plaintiff "voluntarily and negligently" placed himself where he did, when there was a safe mode of exit, and full opportunity to use it, the defendant was not liable as a common carrier. (Pp. 323, 324.) A second judgment for the plaintiff in the same action seems to have been reversed for error in permitting two witnesses to testify that *they* were in the habit of getting off on the same side the train as did plaintiff. (P. 423.) It is plain such evidence was inadmissible.

In Michigan it has been held that the *mere* failure of a railroad company to have a platform on each side of a station is not to be regarded as of itself negligence. There it appeared the plaintiff arrived at a station before the cars came in, and deliberately walked on the side most distant from the platform, etc., and was there injured in attempting to board the train. The court held plaintiff could not be said to have affirmatively proved that she was free from all contributory negligence—by the law of Michigan the burden of proof being on the plaintiff to show that there was no contributory negligence on her part. *Mich. Cent. R.R. v. Coleman*, 28 Mich. 440. In California contributory negligence is a defense to be established by defendant, unless the evidence on the part of the plaintiff shall prove a want of reasonable care on his part. *Robinson v. W. P. R.R. Co.*, 48 Cal. 409.

Bancroft v. Boston, etc. R.R., 97 Mass. 275, was a case in which the plaintiff's intestate was, under the circumstances proved, held guilty of contributory negligence in attempting to cross a track from which he was hurled by an engine.

The English case, *Siner v. Great Western R'y*, 3 Ex. 150, affirmed in 4 Ex. 117 (1), is a case unlike the one at bar in every

1. In *Siner v. Great Western R'y Co.*, L. R. 3 Exch. 150 (Court of Exchequer, Easter Term, 1868), it appeared that plaintiffs were passengers on an excursion train, which was a long one, and which, on account of its length, overshot the platform of the station at which plaintiffs wished to alight. It was then daylight. No warning was given to the passengers to keep their seats, nor did the defendant attempt to move the train back to the platform; in fact, the train was not moved until it started for the next station. After a short time plaintiffs, following the other passengers, attempted to alight, and in doing so the wife strained her knee. There was a footboard between the iron

respect, except that in that case, as in this, the platform was not as long as the train.

2. The court below charged the jury in effect that the plaintiff was entitled to recover, although the evidence showed that her mother was guilty of negligence contributory proximately to the injury, unless the defendant was guiltless of any negligence in a certain particular.

The following instruction embodies the idea repeated in other portions of the charge :

"If you believe from the evidence that there was at the time of the injury complained of a safe platform at Market Street station for the use of passengers in getting on and off the cars, it was the duty of any passenger desiring to leave the train to get off on the platform; and if the mother of the plaintiff disregarded this duty and attempted to get off with the plaintiff on the other side of the train where there was no platform, and thereby *caused or contributed* to the injury, the action cannot be maintained, and you must find for the defendant; *provided* you believe from the evidence that the train stopped long enough to enable the mother and child with reasonable diligence to have landed upon the platform."

At the trial the plaintiff claimed the defendant was negligent in starting the train too soon, and, as said by counsel for appellant, "the legal proposition embodied in the instruction is that defendant must have been free from negligence in that respect in order to prevent a recovery by reason of the negligence of the mother."

But, if the negligence of the mother of plaintiff contributed directly or proximately to the injury, she ought not to have recovered, whatever the negligence of the defendant. It is not giving the defendant the benefit of the rule, as to contributory negligence, to say that the negligence of the plaintiff which contributed as a proximate cause to the injury will prevent

step and the ground which she did not attempt to use. There was no evidence of any carelessness or awkwardness in the manner of descent, except as might be inferred from the foregoing facts. *Held*, that there

was no evidence of negligence on the part of defendant to go to the jury, and that the accident was entirely the result of the plaintiffs' own acts.

This case was affirmed in 4 Exch.

a recovery, provided the defendant has not been guilty of negligence.

Judgment and order reversed and cause remanded for a new trial.

CRAVEN ET AL. V. CENTRAL PACIFIC RAILROAD COMPANY.

Supreme Court, California, May, 1887.

[Reported in 72 Cal. 345.]

ALIGHTING FROM TRAIN—PROXIMATE CAUSE OF INJURY—INSTRUCTION.—The plaintiff was injured while alighting from defendant's train, and the main point was whether the plaintiff jumped before the train stopped, or was thrown by the sudden start of the train after it stopped before she had time to alight. The evidence was conflicting. The court instructed the jury that the plaintiff could not recover if her negligence was the cause of or contributed to the injury. *Held*, that the omission of the word "proximate" was not material and the instruction was proper.

HABIT OF JUMPING OFF MOVING CARS—EVIDENCE.—Evidence that the plaintiff had frequently jumped off the cars while moving, and had been warned of the danger of so doing, was properly admitted.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order refusing a new trial. The facts appear in the opinion.

ALFRED H. COHEN and ROBINSON, OLNEY & BYRNE, for appellants.

WILSON & WILSON, for respondent.

McFarland, J.—This is an appeal from an order of the court below denying appellants' motion for a new trial.

The action was brought to recover damages for personal injuries received by the appellant, Nettie R. Craven, who is the wife of the other appellant, in alighting from a train of cars of respondent. As she was about to get off the train at, or near, a place called Willow Street Station, in Alameda County, she was either thrown or fell violently to the ground, and was injured; and the main question in the case was one of fact, namely: After the train had stopped, did respondent's employees, without giving appellant a reasonable time to alight, carelessly and sud-

denly start it, and thus cause her to fall, or did she carelessly and needlessly jump from the train while it was in motion, and thus cause or contribute to her own injury? Upon this question the evidence was conflicting—although so far as the record shows, the weight of it was against appellants—and the jury found a verdict for respondent. Under these circumstances, the verdict should not be set aside and a new trial ordered, unless there were clear errors of law occurring at the trial, which might reasonably have affected the jury to the prejudice of appellants.

The two grounds of error mainly relied on by appellants' counsel are: 1. A certain omission in the charge of the court to the jury; and 2. The overruling of appellants' objection to certain evidence.

1. The court instructed the jury very fully as to the duty of railroad companies when stopping at stations for the discharge of passengers. They were told that "a railroad company carrying passengers for hire has not discharged its duty, or relieved itself from liability to them, until it has stopped at the end of their journey a reasonable time for them to get off the train in safety"; also, "If you believe the defendant did not afford the plaintiff, Mrs. Craven, a reasonable time for this purpose, but started the train suddenly while she was in the act of getting off the car and before she had time to alight, it failed to perform its duty, was guilty of negligence, and is liable to her for damages she has suffered thereby, not exceeding twenty thousand dollars." Other instructions were given to the same effect. But the court instructed the jury that if the negligence of the plaintiff caused or contributed to the injury complained of, she was not entitled to recover; and appellants contend that a new trial should be granted because the court, in its charge on this point, omitted the qualification, that in order to defeat a recovery the negligence of plaintiff must have contributed proximately to the injury.

A general definition of contributory negligence should, no doubt, include the word "proximate," although it is doubtful if juries attach any very definite meaning to that word. And if, in the case at bar, there were any room for doubt whether the alleged negligence of plaintiff contributed proximately or remotely to the injury, the point here made by appellants might be material. But the whole evidence revolved around this one question, Did

the plaintiff, at the very time of the accident, negligently jump off the train while it was moving, and thus cause or contribute to the injury? If she did not, then the verdict should have been for plaintiffs. If she did, then there can be no doubt that her negligence contributed proximately to the injury. It was the very thing which, then and there, directly and immediately caused it. Under these circumstances, if the court had used the word "proximately" in its instructions, their effect upon the jury would not have been changed; and it would be a vain and unwarrantable thing to order an entire new trial of this action in order to allow the judge of the court below to insert in his charge a word which, when there, would be of no practical consequence.

2. The second point made by appellants is more difficult of solution. There being a conflict of evidence as to the averment that plaintiff carelessly jumped off the train while it was moving, at the time of the injury, the court, against the objections of plaintiff, allowed defendant to introduce evidence to show that, within the year preceding the accident plaintiff had frequently traveled over that route, had frequently jumped off the cars while in motion, and had been warned against the danger of doing so. This ruling is assigned as an error for which a new trial should be granted.

There is no doubt of the general rule applicable to criminal cases, that on the trial of a defendant for the particular crime charged, evidence of the commission by him of other crimes cannot be introduced. The same rule seems to apply in civil cases when it is sought to show that some specific act was done maliciously, or that it was done intentionally with some definite purpose, and not carelessly from mere force of habit. But when, in the absence of any question of evil intent, or of any intent at all, the point of fact to be determined is, whether or not a person did a certain thing, or did it in a particular way, and the direct testimony as to the fact is conflicting, then evidence is admissible to show that he was in the habit of doing the thing in question, or accustomed to do it in a particular way. A sensible man, called upon out of court to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting,

would naturally and properly give some weight to the fact that the person was in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned in court. The evidence, at least, had some legal tendency to show that plaintiff's conduct at the time of the injury was such as defendant ascribed to her.

In *Fitzpatrick v. Fitchburg R.R. Co.*, 128 Mass. 13, which was an action for injuries to a minor while on defendant's track, evidence that plaintiff had frequently been on the track on previous occasions, and had been warned to keep off it, was held to be admissible.

In *Randel v. Tel. Co.*, 54 Wis. 142, it was held that in an action for injuries caused by defendant allowing its wires to lie across the road at a particular place, it was admissible to show that defendant's wires were down at other places, and at times previous to the date of the injury complained of.

In *State v. Boston, etc. R.R.*, 58 N. H. 410, the question being as to the rate of speed at which defendant's train was going at a particular time and place, evidence was held admissible of the rate of speed at which the same engineer drove the train at that place on previous occasions.

In the case of *State v. Manchester, etc. R.R.*, 52 N. H. 549, the court uses language peculiarly applicable to the case at bar. One of the questions in that case was whether or not the engineer and fireman of defendant's train ran it over a certain crossing at the time when the accident complained of occurred, without ringing the bell or sounding the whistle. There was direct evidence on one side that neither of the signals was given, and just as direct evidence on the other side that they were both properly given. Under these circumstances the court below admitted evidence that the same engineer and fireman, during the preceding year, had a number of times passed the crossing without giving the signals. Upon appeal the appellate court held the evidence to have been properly admitted, and in their opinion say: "It would seem to be axiomatic that a man is more likely to do or not to do a thing, or to do or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done, or omitted to be done, without any particular intent or purpose to injure anyone. It

cannot apply to acts that are done intentionally, willfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. . . . If, in this case, it had been charged that these agents of the corporation had knowingly, intentionally, willfully, and maliciously done, or omitted to do, any act for the purpose of injuring the deceased or anybody else, then the only questions would be, was the act done or omitted as charged? and, did the knowledge, the intention, the will, or the malice exist when the act was done or omitted? But when the question is: Did these servants of the road, without any intention whatever, and through mere negligence and carelessness, omit to give these signals on that occasion? we think the inquiry was properly made as to what they had done before in that regard, or whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were more probably negligent and careless, because they had before frequently neglected the same duty with impunity, and had thus become habitually negligent in that regard."

These views of the Supreme Judicial Court of New Hampshire seem to us to be correct; and applying them to the case at bar, they solve the point now under discussion in favor of the ruling of the court below. The two cases of *Largan v. Cent. Pac. R.R. Co.*, 40 Cal. 272, and *Martinez v. Planel*, 36 Cal. 578, cited by appellant, are not in point.

It may be remarked, generally, that unless the case falls within some well-recognized class of exceptions, an evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to the weight and not to the admissibility of evidence.

Some other points are made in the record, but the two above noticed are the only ones discussed in the briefs. We see no error that would warrant a new trial.

Judgment and order affirmed.

FRANKLIN v. SOUTHERN CALIFORNIA MOTOR ROAD COMPANY. (1)

Supreme Court, California, July, 1890.

[Reported in 85 Cal. 63.]

DUTY OF RAILROAD COMPANY TO PROTECT PASSENGERS.

AGAINST DANGER IN ALIGHTING.—A railroad company that carries a passenger beyond and away from all its usual stopping places and to a place where there are no accommodations for passengers to get on or off its cars, and where there is special risk and hazard because of the switching of the engine, must use every precaution for the protection of the passenger against the danger of the moving engine, and whether it did so or not was a proper question to be submitted to the jury.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—It was

also a question for the jury to determine whether the passenger with such knowledge as she possessed of the peril of the place, and with the presumptions she was entitled to indulge as to the degree of care which the employees of the company would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury.

Negligence is not absolute, but is relative to the circumstances surrounding the case. It always relates to some circumstance of time, place and person, and whether there was contributory negligence in any given case it is generally the province of the jury to find from the facts and circumstances.

WHEN NONSUIT SHOULD BE GRANTED.—Nonsuit on the ground

of contributory negligence should only be granted when, giving the plaintiff the benefit of all controverted questions, it is apparent to the court that a verdict in his favor must be set aside.

WHEN NEGLIGENCE CANNOT BE IMPUTED TO PASSENGER.—

Carriers owe more than an ordinary duty to their passengers and negligence cannot be imputed to a passenger who does not anticipate culpable negligence on the part of the carrier. The passenger has a right to act on the presumption that the carrier's employees will use the degree of care which persons of ordinary prudence are accustomed to employ under similar circumstances.

APPEAL from a judgment of the Superior Court of San Bernardino County. The facts appear in the opinion.

ROLFE & FREEMAN and H. M. WILLIS, for appellant, cited : *Glascok v. C. P. R.R. Co.*, 73 Cal. 141 ; *Fleming v. W. P. R.R. Co.*, 49 Cal. 253 ; *Wilcox v. Rome, etc. R.R. Co.*, 39 N. Y. 358 ;

1. Cited in *Benson v. Cent. Pac. R. Co.*, 98 Cal. 45, 51, 2 Am. Neg. Cas. 201.

100 Am. Dec. 440; *Ernst v. H. R. R.R. Co.*, 39 N. Y. 61; 100 Am. Dec. 405; *Harty v. C. P. R.R. Co.*, 42 N. Y. 468; *Cleveland, etc. R.R. Co. v. Elliott*, 28 Ohio St. 341; *Penn. Co. v. Rathgeb*, 32 Ohio St. 66.

WATERS & GIRD and FRANK F. OSTER, for respondent, cited: *Ringgold v. Haven*, 1 Cal. 117; *Dalrymple v. Hanson*, 1 Cal. 127; *Mateer v. Brown*, 1 Cal. 222; *Field on Dam*. 519; *Alvarado v. De Celis*, 54 Cal. 588; *Board v. Martin*, 57 Cal. 139; *Leahy v. S. P. R.R. Co.*, 65 Cal. 150; *Richardson v. Kier*, 34 Cal. 63; 91 Am. Dec. 681; *Needham v. S. F. & S. J. R.R. Co.*, 37 Cal. 410; *Fernandes v. Sacramento City R.R. Co.*, 52 Cal. 45; *Chidester v. Consol. Ditch Co.*, 59 Cal. 197; *Petty v. Hannibal, etc. R.R. Co.*, 28 A. & E. R.R. Cas. 618; *Long Island Co. v. Greany*, 24 A. & E. R.R. Cas. 473; *Moore v. Murdock*, 26 Cal. 522; *Rudd v. Davis*, 3 Hill, 287; *Geary v. Simmons*, 39 Cal. 232; *Schierhold v. N. B. & M. R.R. Co.*, 40 Cal. 447; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Jamison v. San Jose, etc. R.R. Co.*, 55 Cal. 593, 596; *Hutchinson on Carriers*, §§ 499, 502, 503, 612, 615; *Robinson v. W. P. R.R. Co.*, 48 Cal. 420; *McGuire v. H. R. R.R. Co.*, 2 Daly, 76; *Hurlburt v. N. Y. etc. R.R. Co.*, 40 N. Y. 145; *Green v. Erie R.R. Co.*, 11 Hun, 333; *Beach on Contributory Negligence*, § 57; *Gonzales v. N. Y. etc. R.R. Co.*, 39 How. 407; *Armstrong v. N. Y. etc. R.R. Co.*, 66 Barb. 437; *Dickens v. N. Y. etc. R.R. Co.*, 1 Keyes, 28; *Warren v. Fitchburg R.R. Co.*, 8 Allen, 227; 85 Am. Dec. 700; *State v. Balt. etc. R.R. Co.*, 35 A. & E. R.R. Cas. 412; *Chaffey v. Boston & L. R.R. Co.*, 104 Mass. 108; *Plopper v. N. Y. etc. R.R. Co.*, 13 Hun, 625; *McQuilken v. Cent. Pac. R.R. Co.*, 64 Cal. 463; *Brassell v. N. Y. etc. R.R. Co.*, 84 N. Y. 241; *Fowler v. B. & O. R.R.*, 8 A. & E. R.R. Cas. 480; *Shear. & Redf. on Neg.* § 28; *Ernst v. H. R. R.R. Co.*, 35 N. Y. 9; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521.

FOX, J.—Action for personal injuries. Verdict and judgment for \$1,750 in favor of plaintiff, from which defendant appeals, the case coming up on the judgment roll, which includes the evidence embodied in a bill of exceptions.

On the trial it was admitted that the defendant, a corporation, owns and operates a motor railroad running from San Bernardino to Colton. The proof shows that the road is operated with cars propelled by steam-power.

Two points are presented and insisted on upon the appeal: 1. That the court erred in denying defendant's motion for a nonsuit; 2. That the evidence is insufficient to justify the verdict.

1. It was shown on behalf of plaintiff that on the morning of June 30, 1888, she entered the car of defendant at San Bernardino as a passenger to be transported thence to Colton. Owing to some difficulty in making change, her fare was not paid in advance, but it was paid at Colton, before she attempted to alight from the car. No question is made but that she was a regular passenger, and had all the rights of transportation, care and protection that is due to any passenger traveling by railroad. The road of defendant enters Colton from the north by way of Conn Street. At the northwest corner of Conn and Front Streets, commonly called Thompson's Corner, was situate the office of the company for the town of Colton, and that corner was proved and in argument is conceded to have been the usual stopping place for the car. The conductor was notified by plaintiff and her escort of her desire to get off the car at that place. The track of the road continues south along Conn Street, across First Street, and then turns to the west on a strip of land known as the Railroad Reservation, being a strip of open ground lying between First Street and the track of the Southern Pacific Railroad Company. This entire strip of ground is used much as a street the track of defendant's road traversing its entire length, and the place being open in common with Front Street and used by the public in driving vehicles over it to and from the Southern Pacific Railroad depot. At about one hundred and forty feet west of the west line of Conn Street there is a platform along the southerly side of the track of defendant's road, where the cars of defendant stop to discharge and receive passengers to and from the Southern Pacific depot. At about two hundred and forty feet west of this platform there is an automatic switch, by means of which the cars of defendant, without stopping, are switched off onto a track running at a distance of between three and four feet north of and parallel with the main track for a distance of about one hundred and eighty feet, where it again connects with the main line, which continues still to the west about ninety feet and enters an engine-house, also belonging to or used by defendant. (These distances are computed from a diagram accompanying the transcript.)

Reaching Colton, defendant runs its trains onto the side track, slackens its speed, uncouples without stopping, and runs the engine forward onto the main track, the brakeman stopping the coach on the side track. Sometimes the engine runs into the engine-house, and sometimes it stops on the main track without going into the engine-house, but it always comes to a stop, and usually remains some little time oiling up, or the like. It then runs down the main track to the eastern end of the switch, runs up the side track, and couples onto the coach, when the train is ready for its return trip. It will thus be seen that this point west of the platform is practically the switching-yard of the defendant.

When plaintiff and her escort entered the car at San Bernardino they notified the conductor that they wished to get off at Thompson's Corner. Upon approaching that point, observing that the train did not begin to slow down, they arose from their seats and signaled the conductor, when he asked them if they wished to get off there. To this they answered in the affirmative, but by that time the car had passed that station, and the conductor said he would stop at the next station, which was the platform aforesaid. The train, however, did not stop at the platform, but was run forward and onto the side track, where the engine was uncoupled, without stopping, and run forward, as usual, onto the main track west of the switch, the coach being stopped by the brakeman about midway between the two ends of the switch or side track. At that point there was no platform on either side for the accommodation of passengers getting off or onto the cars. The coach was divided into two compartments by a dead-wall crossing the same from side to side. The plaintiff and conductor were in the rear or most easterly compartment, and the brakeman on the platform at the west end of the car. From the rear compartment no person could see anything to the west, on either the main or side tracks. As the coach came to a stop, the plaintiff rose, and, having in the mean time found some coin, paid the conductor her fare, receiving some small change in return, and immediately went to the rear door and alighted on the south side, her home being across all the tracks of both roads, on the south side, and some little distance therefrom. Her escort stopped a moment to speak to the conductor, and then followed her. As he started to step down from the platform, by leaning

forward and looking outside the coach to the westward, he saw the engine coming down the main track, and very near to plaintiff, who was at the moment walking away from the platform, and about to cross the main track, less than three feet from the side of the coach. He gave a warning outcry, and simultaneously the plaintiff felt the motion of the atmosphere made by the approaching engine, and casting her eyes in that direction, saw the engine almost immediately upon her. She threw herself backward to avoid it, but it was too late, and she was struck down by the engine and dragged several feet, and rolled over once or twice, receiving personal injuries for which damages are claimed in this action. Some of the witnesses on the part of the plaintiff testify that no bell was rung or whistle sounded; all testify that they heard none; and there is no pretense that the plaintiff was warned or cautioned by any person of the approach of the engine or against getting off on that side. The engine made no stay on this occasion at the west end, but as soon as it had passed the switch and come to a halt, reversed, and came immediately back down the main track. But a few moments intervened between the time the coach came to a halt and the time plaintiff was struck by the engine.

The evidence presenting this state of facts at the close of plaintiff's case in chief, defendant moved for a nonsuit, on the ground that plaintiff had failed to prove a sufficient case for a jury; that the evidence failed to show negligence on the part of the defendant; and on the further ground that the evidence did show contributory negligence on the part of plaintiff, which was the proximate cause of the injury she received. The court denied the motion, and defendant excepted.

There was no error in denying this motion. The evidence tending, as it did, to prove the material allegations of the complaint, it was a proper case for the jury. *Alvarado v. De Celis*, 54 Cal. 588; *Leahy v. S. P. R.R. Co.*, 65 Cal. 150. Negligence is not absolute, but is relative to the circumstances surrounding the case. *Richardson v. Kier*, 34 Cal. 63; 91 Am. Dec. 681; *Needham v. S. F. & S. J. R.R. Co.*, 37 Cal. 410. It always relates to some circumstance of time, place, and person, and whether there was contributory negligence in any given case is generally a question for the jury to pass upon and determine. *Jamison v.*

S. J. & S. C. R.R. Co., 55 Cal. 593. It is generally an inference from facts and circumstances, which it is the province of the jury to find, and nonsuit on the ground of contributory negligence should only be granted when, giving the plaintiff the benefit of controverted questions, it is apparent to the court that a verdict in his favor must be set aside. *Schierhold v. N. B. & M. R.R. Co.*, 40 Cal. 447.

The cases cited by appellant in support of the motion are not parallel cases. They are most of them, if not all, cases of strangers or persons acting independently, and having no relation to the defendant—cases of persons toward whom the defendant owed no duty other than that which all persons owe to each other under like circumstances of meeting by chance—not cases involving the duties and obligations of a carrier to a passenger. Carriers owe more than an ordinary duty to their passengers (*Jamison v. S. J. & S. C. R.R. Co.*, *supra*); and negligence cannot be imputed to a passenger such as this plaintiff was, for that she did not anticipate culpable negligence on the part of the carrier. She had a right to act on the presumption that the employees of the defendant would use the degree of care which persons of ordinary prudence are accustomed to employ under the same or similar circumstances. *Robinson v. W. P. R.R. Co.*, 48 Cal. 421. In this case the defendant had negligently and wrongfully carried the plaintiff beyond and away from all its usual stopping places, where it was accustomed to receive or discharge passengers, into what was practically its switching-yard, where there were no accommodations for passengers to get on or off its cars, and to a point where defendant knew, though the plaintiff may not have known, that there was special risk and hazard. Under such circumstances it was defendant's duty to use every precaution for her protection. Whether it did so or not was a proper question to be submitted to the jury; and it was equally for the jury to determine whether she, with such knowledge as she possessed of the peril of the place, and with the presumptions she was entitled to indulge as to the degree of care which the employees of defendant would exercise for her protection, was herself guilty of negligence which proximately contributed to her injury.

2. We have carefully examined the evidence, and find that there is evidence to support the verdict. Indeed, on all the most

important points in the case, it seems to be without substantial conflict. The judgment cannot, therefore, be disturbed on the ground of insufficiency of evidence.

Judgment affirmed.

NAGLE v. CALIFORNIA SOUTHERN RAILROAD COMPANY.

Supreme Court, California, February Term, 1891.

[Reported in 88 Cal. 86.]

DUTY OF CARRIERS OF PASSENGERS.—A railroad company, as a carrier of passengers, is responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and, therefore, for the slightest neglect, but it cannot be held to the responsibility of warranting the safety of its passengers at all events.

CONTRIBUTORY NEGLIGENCE—DETERMINED BY COURT.—It is for the court on the undisputed facts to determine if the plaintiff was guilty or not of contributory negligence.

WHEN NONSUIT NOT PRECLUDED.—The fact that the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff does not preclude a nonsuit whenever the evidence of the plaintiff so conclusively establishes a defense that the court would grant a new trial in case of a verdict in his favor upon like evidence.

INJURED WHILE ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE.—A passenger who, while the train is halting a moment upon a trestle, and without any intimation from the trainmen that it is his stopping place, alights hurriedly in the dark, without carefully looking for a place to alight, and is injured in so alighting, is guilty of contributory negligence.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. The facts appear in the opinion.

J. E. DEAKIN and DEAKIN & STORY, for appellant, cited: Cooley on Torts, 642, 643; Shear. & Redf. on Neg. 4th ed. 495, 519, 521; Fairchild v. Cal. Stage Co., 13 Cal. 605; Boyce v. Cal. Stage Co., 25 Cal. 469; Terre Haute, etc. R.R. Co. v. Buck, 96 Ind. 346; 49 Am. Rep. 183; Cooley on Torts, 375; Griffin v. Willow, 43 Wis. 509, 512; Robinson v. W. P. R.R. Co., 48 Cal. 422; Strang v. S. & P. R.R. Co., 61 Cal. 328; Dufour v. C. P. R.R. Co., 67 Cal. 322; Delaney v. Milwaukee, etc. R.R. Co., 24 Wis.

586; *Taber v. Delaware, etc. R.R. Co.*, 71 N. Y. 489; *Jamison v. S. J. etc. R.R. Co.*, 55 Cal. 598.

A. BRUNSON, for respondent, cited: *Lamb v. Reckamation Dist.*, 73 Cal. 131; 2 Am. St. Rep. 775.

Footnote, C.—The plaintiff brought this action to recover damages for injuries caused to him by the alleged carelessness and negligence of the defendant. After the introduction of the plaintiff's evidence, a jury having been waived, the defendant moved for a nonsuit, which was granted. From the judgment rendered in the premises, and an order denying a new trial, this appeal was taken.

The facts as they appear in the evidence of the plaintiff are, that on Sunday night, April 15, 1888, he was traveling on the defendant's railroad; had bought his ticket at San Diego for La Jolla, a station on that road. He had been on this journey before, in the daytime, and knew that at La Jolla there was a platform to get out upon, and that it had a shed over it, and the ground was level around the station at that point. In going from San Diego to La Jolla before, he knew the train had only made three stops—at Old Town, Morena, and La Jolla. There were five other persons with him on the present trip, passengers to La Jolla. He did not know whether there were lights about La Jolla and the station at night. The train stopped some time at Old Town to water or coal; it then stopped at Morena. After this it again stopped; he did not "know what for." Everybody got astir in the car, and "the men allowed this was La Jolla." There was a kind of rush; that is, of the men in the car who had to get off at La Jolla, thinking they were there. The man alongside of the plaintiff stood up; the latter sat still until the train came to a stop. The man said; "You had better get out quick; the train don't stop a minute." The plaintiff got out, and in doing so, "walked right off, and went down a cañon, as our car was standing on a trestle-work." He did not know how long this was after leaving Morena, or how far this place was from La Jolla. He thought he was walking down the steps to "the platform," instead of which he went down the cañon. He fell ten or twelve feet; nobody else got out; he sprained his ankle and suffered other injuries.

On cross-examination, he did not seem to be certain that the

train did stop at Morena, or how long; when the whistle blew he did not see the conductor, the latter having taken up the plaintiff's ticket before the train stopped; nor did he see any of the trainmen when he walked off. The whistle was blown sharply, but how many times he did not remember. On redirect examination he knew that the train stopped twice after leaving San Diego before reaching the trestle, once at Old Town and once at Morena.

The plaintiff thought the distance from where he walked off to La Jolla "must have been a couple of miles."

His brother, also a witness for him, stated that it might be "in the neighborhood of a mile," it may be a little more or less, and that he had heard it was about four miles between Morena and La Jolla. He and the other men in company thought the stop was for La Jolla. There had been no warning that they were going to stop, or that they must keep their seats. "From habit of getting off at the third stopping place, we made the move to get off there."

On cross-examination, he thought the distance to La Jolla from where the plaintiff stepped off was more than a mile. He heard no whistle, and the train stopped on the trestle perhaps a minute. At the time the train stopped, neither conductor nor trainmen were in the car.

Three of the company went out at one door of the car and three at the other. Another witness for plaintiff testified that the night was rather dark; that the third stop, which they supposed to be La Jolla, was about midway between Morena and La Jolla; that is, about two miles from either place. He did not know what the train stopped for at the third point; it was "no stopping place at all; it was just simply a stopping place for the train." He got up to get off at a different door from the plaintiff, but did not get off. He thought it "pretty hard to look the length of the car and tell the parties and recognize them." He did not think the train stopped at the trestle over *fifteen seconds*. It was just about time enough to come to a standstill and move on. "It only came to a standstill and moved." He "judged" the trestle was about midway between Morena and La Jolla. He heard none of the trainmen say it was La Jolla; there was no station called or mentioned by any of them.

Another witness swore that the train stopped at Old Town then at another little station; "after that they stopped where there had been a washout; they had been working there, and they never 'hollered' for a station; they kind of checked up here. It was dark. We started to get off. Mr. Nagle (the plaintiff) got off, and when he got off, fell." They started so quick that he, having some bundles to gather up, did not have time to get off.

From all this it appears that the cause of the stoppage of the train was a proper one, that due care might be taken of the whole train and all the passengers on it. As the train was approaching a washout where danger might exist, it was the duty of the conductor and trainmen to be at their several stations—at the brakes and on the lookout—to see that there was no injury likely to result in passing this dangerous spot on the road. They could not perform this in the short time of the stoppage, and also go through the cars to warn passengers not to get out. For this stoppage lasted at the most a minute, or, as a witness said, not more than "fifteen seconds." If they had acted as the plaintiff seems to contend they should, and an accident had happened to the train, and injuries been received by the passengers, then the negligence of the defendant would have been apparent. It was evidently the habit, that of making the third stop at La Jolla, that induced the plaintiff and his companions to rush for the door and the former to jump out so quickly as not either to attempt to look out and see if he was at La Jolla, or apparently to use any sort of precaution in seeking to ascertain at what kind of a place he was stepping off.

It appears that no one else got off, and conceding that the two persons immediately behind the plaintiff did not get off because he had stepped off into the cañon, yet it still appears that none of the three at the other door of the car got off, probably because they saw that they were not at La Jolla, or that the place of the stoppage was not a proper place at which to get off.

It does not appear to have been so dark but that a person, by the proper use of his eyes, might have distinguished a cañon lying immediately before him, ten or fifteen feet deep, from a level place, where there was a platform and shed over it, which were to be seen at La Jolla. Instead of attempting to do this,

the plaintiff heedlessly jumped off the car, and could not have taken time to look about him, as it would appear.

The defendant cannot be held to the responsibility of warranting the safety of the plaintiff at all events. *Treadwell v. Whittier*, 80 Cal. 585, 586; 13 Am. St. Rep. 175.

It is "responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and therefore for the slightest neglect." *Treadwell v. Whittier, supra*.

It was for the court, on the undisputed facts, to determine if the plaintiff was guilty or not of contributory negligence. *Glascock v. C. P. R.R. Co.*, 73 Cal. 137. And even if the burden of proof is on the defendant to show contributory negligence on the part of the plaintiff, this does not preclude a judgment "by way of nonsuit, whenever the evidence of the plaintiff so conclusively establishes a defense as that the court would grant a new trial in case of a verdict in his favor upon like evidence." *McQuilken v. C. P. R.R. Co.*, 50 Cal. 8.

The plaintiff had no intimation from the trainmen that this was his stopping place, or that he should get off, but got off apparently because some irresponsible person said it was La Jolla, and perhaps because of the habit of persons getting off there usually as the third stopping place from San Diego. He got off in the dark, when the best use of one's eyes is necessary, and we must suppose that his were good. He should at least have used them, acting, as he was, upon his own responsibility, with sufficient care to have "looked before he leaped." This is the rule, as we think, announced in *Fleming v. W. P. R.R. Co.*, 49 Cal. 257; *Glascock v. C. P. R.R. Co., supra*.

We think the judgment and order should be affirmed, and so advise.

VANCLIEF, C., and BELCHER, C., concurred.

The Court.—For the reasons given in the foregoing opinion, the judgment and order are affirmed.

ALIGHTING FROM STREET CAR—DEFECTIVE STEP—CHARGE TO JURY.—In an action for damages for injuries received by a passenger while attempting to alight from a street car which had a defective step and was prematurely started, there was no evidence tending to show any negligence on the part of the plaintiff,

and the court *held*, that consequently the following instruction to the jury could work no injury to the defendant: "If you believe from the evidence that at the time of the accident the plaintiff was guilty of negligence upon her part, that contributed to produce the injuries, and you also believe from the evidence that the defendant was guilty of gross negligence, and that such gross negligence caused the injuries complained of, then the court instructs you that the defendant is liable, notwithstanding the contributory negligence of the plaintiff."—*Supreme Court, California, July, 1891. WILSON v. THE FOURTEENTH STREET RAILROAD COMPANY, 90 Cal. 319.*

MORGAN v. THE SOUTHERN PACIFIC COMPANY.

Supreme Court, California, August, 1892.

[Reported in 95 Cal. 501.]

ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE.—

In an action for injuries caused by backing the train after it had stopped at a station while the plaintiff was getting off, and there is conflicting evidence as to the length of time between the stop and the backward movement, the question of the plaintiff's contributory negligence in leaving her seat when the train first stopped was properly left to the jury to decide.

DAMAGES—CHARGE TO JURY.—In such an action it is not error to charge the jury that "money is an inadequate recompense for pain" where they are also instructed that "resulting pain is an element of damage to be compensated," and that if the plaintiff was entitled to recover, "the measure of her recovery is what is called compensatory damages."

EXCESSIVE DAMAGES—WHEN VERDICT WILL NOT BE DISTURBED.—A verdict will not be disturbed because excessive unless the amount of damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.

RULE AS TO DAMAGES FOR INJURY TO PERSON.—The rule that is applied in actions for the death of a relative, that the damages should not exceed an amount upon which the legal interest would equal the value of the injured party's past earnings and probable future earnings does not apply to the case of a plaintiff's own person being injured.

A verdict for fifteen thousand dollars for personal injuries sustained through a railroad company's negligence is not excessive.

APPEAL from a judgment of the Superior Court of Kern County and from an order denying a new trial. The facts appear in the opinion.

E. L. CRAIG, FOSHAL WALKER, HORACE HAWES, and R. B. CARPENTER, for appellant.

CHARLES G. LAMBERSON, J. W. AHERN, and LAMBERSON & TAYLOR, for respondent.

McFarland, J.—This action was brought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, a railroad company. It is averred in the complaint, that while plaintiff was in the act of alighting from the car of defendant, it was, through the negligence of defendant's servants and employees, suddenly and violently put in motion, whereby plaintiff was, without any fault on her part, thrown upon the ground and seriously injured. The jury gave a verdict in favor of plaintiff for \$15,000, for which amount judgment was rendered; and defendant appeals from the judgment, and from an order denying its motion for a new trial.

1. The point of appellant that the evidence was insufficient to warrant any finding of liability on the part of defendant for the injury complained of cannot be maintained.

The accident happened at the town of Delano. At that place the train usually stops with the locomotive at a water tank, so that water may be taken for the engine while passengers are going off and on the train. When the train arrived on the evening of the accident the engineer did not succeed in stopping it until the locomotive had gone about a car's length beyond the water tank; and he moved the train back far enough to bring the engine at the proper place to take water. He testified that he did this immediately, so that there was only a moment of time between the first stop and the commencement of the backward movement; and his testimony to this effect was to some extent corroborated. Counsel for appellant contends that this fact being established, it follows that plaintiff must have been guilty of contributory negligence; because, if she had retained her seat in the car until the train first stopped, as she ought to have done, she could not have been on the steps of the platform when the train started back. It is argued that she must have been wrongfully on or near the steps before the car stopped. But witnesses for

the plaintiff testified that it was from a half-minute to a minute after the train stopped before it started back ; plaintiff testified that she did not leave her seat until the car stopped ; and another witness testified that she was not on the platform when the train stopped. There was, therefore, a substantial conflict of evidence as to the period of time which elapsed between the stop and the beginning of the movement backwards. Counsel say that it was natural and in accordance with the usual course of things for the engineer to have immediately reversed his engine and started back when he found himself beyond the water tank ; that there was no reason for his waiting thirty or sixty seconds before doing so ; and that, therefore, the contrary testimony of plaintiff's witnesses should not be considered as raising a substantial conflict. It could be well argued, and, no doubt, was so argued to the jury, that the engineer's version of the affair was more probably correct than that of plaintiff's witnesses ; but, after all, the question was one of probability, to be determined by weighing conflicting evidence. It was, therefore, a question fairly within the province of the jury to decide.

2. The court, in the course of its charge to the jury, used the following language : " Money is an inadequate recompense for pain ; but as the law can afford no other redress, it aids the sufferer to obtain this in such measure as a jury, dispassionately considering all the circumstances of the case, will allow ; and whether the injury is the result of negligence or direct personal violence, the resulting pain is an element of damage to be compensated. In other words, it is an element of compensatory damage." And appellant contends that the use of the words " money is an inadequate recompense for pain " constitutes a material and reversible error.

The language objected to would, no doubt, be more appropriate to social and private conversations and disputations than to the grave duty of instructing a jury, in discharging which the utmost possible accuracy should be aimed at, and loose general remarks avoided. The remark objected to is probably true in a general abstract sense, although it can hardly be considered as specially apropos to a charge in which the jury are told that money may be given as a recompense for pain. But taken in connection with other parts of the instruction, we do not see how the language

objected to could have influenced the jury to the prejudice of appellant. Counsel contend that by this language the court invited the jury to give any sort of damages they might see fit to give, compensatory or exemplary, and to any amount within the prayer of the complaint, and that in effect it told them that no matter how large their verdict might be, it would still be "an inadequate recompense for (plaintiff's) pain." But such would be a strained and incorrect construction of the language used; and it is not to be presumed that a jury would give it any such meaning. The whole charge was upon the theory that exemplary damages could not be given; and at appellant's request the court expressly instructed the jury that if plaintiff was entitled to recover, "the measure of her recovery is what is called compensatory damages—that is, such sum as will compensate her for the injury she has sustained." The jury were correctly told that "the determination of the amount is committed to the judgment and sound discretion of the jury;" and that it should be "in such measure as a jury, dispassionately considering all the circumstances of the case, will allow;" and we do not think that the weight of these instructions could be lessened to any appreciable extent by the general remark which appellant assails.

3. The most difficult question in the case is raised by appellant's point that the damages awarded by the jury are excessive.

The amount of the verdict is certainly quite large—larger than we, if sitting as a jury, would have felt it our duty to give. But that consideration alone is not sufficient to warrant us in disturbing the verdict. There is no absolute rule in such a case; and about all that can be safely said on the subject may be found in the opinion of the court in *Aldrich v. Palmer*, 24 Cal. 513, and the cases there cited. The general conclusion, as nearly as one can be formulated, is as there stated, namely, that a verdict will not be disturbed because excessive, "unless the amount of the damages is obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury."

Cases are cited where verdicts for damages less than the amount awarded in the case at bar have been set aside; but there are many cases where verdicts for larger amounts have been allowed to stand. Two cases exactly alike are not to be found. Counsel

argue that because in the case at bar legal interest on the amount of the verdict would exceed in value plaintiff's past earnings, and her probable future earnings if she had not been injured, therefore the amount is excessive. But that rule has never to our knowledge been applied to a case where the cause of action was the plaintiff's own personal injury; it has been applied only to cases where suit has been brought for the death of a relative. Such was the fact in the authorities cited on the point by appellant. *Cooley on Torts*, 274; *Railroad Co. v. Bayfield*, 37 Mich 205; *Rose v. Railroad Co.*, 39 Iowa, 254.

The great difficulty in the present case is in determining the extent of plaintiff's injuries, or rather, what conclusion the jury had the right to arrive at from the evidence as to the extent of those injuries. As no bones were broken, and there was but little external evidence of injury, it is no doubt possible that plaintiff's sufferings from the result of the accident, and its injurious effect upon her physical and mental health, may have been greatly exaggerated. But there was direct testimony to the points that she was greatly injured in the right arm and shoulder; that the internal ligaments of the shoulder joint were seriously ruptured; that she suffered great pain, and at the time of the trial, nearly two years after the accident, still suffered great pain in the right arm and shoulder, in the back of the head and neck, and in the chest; that her memory was at times impaired; that she was unable to earn a livelihood, and practically unable to do or perform services of any value; that but little progress had been made toward recovery; and that her injuries would probably be permanent. There was, no doubt, some evidence tending to show that her condition was not as bad as above stated; but the issue as to the extent of her injury was one of fact, about which there was a substantial conflict of evidence; and we cannot say that the jury were not warranted in finding according to the direct testimony above referred to. And such being the case, we are not prepared to say that the verdict should be set aside for excessiveness in the amount of damages.

There are no other points in the case requiring notice.

Judgment and order appealed from are affirmed.

BENSON V. CENTRAL PACIFIC RAILROAD COMPANY.

Supreme Court, California, March, 1893.

[Reported in 98 Cal. 45.]

INJURY TO PERSON ON RAILROAD TRACK — PROXIMATE CAUSE—CARRYING PERSON BEYOND STATION.—Stopping a train an insufficient length of time to permit a passenger to alight at a station, coupled with a direction from the conductor to get off at the next station and walk back, is not the proximate cause of an injury to the passenger who, while walking back to the station on the track of the railroad company, is struck by a train.

INJURY TO CHILD ON RAILROAD TRACK IN CUSTODY OF FATHER—COMPANY NOT LIABLE.—When a child six years of age, that was walking back to a station on the track of a railroad, in the custody of her father, was first discovered by the engineer of a train as she was being led by her father from the track upon which the train was running to the parallel track, and after reaching the parallel track became frightened and broke away from her father and ran in front of the moving train, and every effort was made to stop the train as soon as she was seen to be in peril, there was no evidence of negligence on the part of the railway company that would make it liable for the injury.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. The facts appear in the opinion.

HENRY E. HIGHTON and I. B. L. BRANDT, for appellant.

W. H. L. BARNES, for respondent.

The Court.—This action is brought by the plaintiff, an infant, to recover damages for personal injuries alleged to have been sustained by her walking upon the roadway of defendant, by being run into by a locomotive operated by defendant.

The case was tried by a jury, which returned a verdict for defendant, and the appeal is from the judgment and from an order refusing a new trial.

Plaintiff's evidence tended to prove the following facts:

Plaintiff, a child of but six years of age, with her father and other members of her family, took passage on a train of defendant for Watt's Station, in Alameda County. As the train approached Watt's Station, the whole family rose and took positions at the door of the car, so as to be able to step off the train without delay,

and immediately on the stoppage of the train at the station proceeded to leave it; but the stop was so short that but part of the family were able to get off, and the train moved away with her father and the plaintiff and her brother still on it. While the family was thus endeavoring to get off, the conductor of the train was on the platform of the car, and when the train began to move, the father asked him, "Why didn't you let me off?" and the conductor thereupon told the father: "You cannot get off here; you have got to go to the next station, only a short distance, and you can walk back when you get to the next station." When the next station, Emery, was reached, the father, with plaintiff and her brother, left the train. The father had never before been on the part of the railroad between Watt's and Emery Station, and on stepping off, looked up and down the railroad. He saw no cars. He could observe no other route than the railroad to get back to Watt's Station, and in fact there was no other way, one side of the railroad right of way being the waters of the bay, and the other a slough, running through marsh and swamp. There were two tracks, and supposing that if a train should come along behind him it would be on the east track, as the train which he had just left was occupying the west track, the father started to walk southerly along the east track to Watt's Station, carrying the baby on one arm and holding plaintiff by the hand; and he had thus proceeded for a distance of five hundred or six hundred feet south of Emery when he heard a noise back of him. Looking in the direction of the noise he saw a train, but owing to the existence of a curve in the road, it was impossible for him to determine on which track the train was coming. A moment later he looked again at the train, and saw that it was on the east track, the same on which he was walking. He then left that track, crossing to the west track, and had entirely cleared the east track, continuing all the time to hold plaintiff by the hand, when the plaintiff, frightened by the approach of the train, while it was yet one hundred and fifty or two hundred feet from her, broke away from her father, and ran back to and on the east track, where she was struck by the flying train, and received the injuries complained of. The accident happened in broad daylight; the view of the railroad between the two stations, a distance of two thousand and sixty-two feet, was unobstructed, and a person standing

at either station could see to and some distance beyond the other; and a person on the spot where the plaintiff and her father were when the latter first heard the train, namely, six hundred feet south of Emery Station, could easily be seen from the latter place. Plaintiff and her father were, in fact, noticed by the fireman of the train, according to the latter's evidence, while they were still on the track on which the train was approaching them, and were seen by him to cross over to the other track; and they were observed by the engineer when about one hundred yards from the train; notwithstanding which, the train, which had pulled out of Emery Station at a speed of fifteen miles an hour, continued such speed. No bell was rung or whistle blown, or other signal given plaintiff, and no attention paid to her presence on the track until the train was within one hundred and fifty feet of her, when an endeavor was made to stop it, but too late to be of use.

To which must be added the uncontradicted testimony introduced by defendant, that when the engineer first saw plaintiff's father, he was in the act of stepping off the track upon which the train was traveling toward the other track, and succeeded in getting entirely clear of the track and out of danger; and further, that the engine was provided with the best equipment known for stopping the train. That the engineer kept his eye upon the plaintiff and her father, and, as soon as she unaccountably broke from her father and ran across the track in front of the engine, every possible effort was made to prevent the injury.

Appellant contends that various erroneous instructions were given by the court to her injury, and that several instructions asked for by her were wrongfully refused—that because of these errors the question of negligence was not properly submitted to the jury.

But we think there was no evidence of negligence on the part of the defendant, and that a verdict for the plaintiff, had one been rendered, could not have been sustained; and in considering this question, we shall adopt the rule laid down in *Wilson v. S. P. R.R. Co.*, 62 Cal. 172, that where the evidence of negligence consists of circumstances from which inferences may be drawn for or against it, it is the province of the jury to determine whether there was negligence or not.

There were no houses along this roadway at the point where the accident occurred, or for some considerable distance either way. The roadbed was about twenty-five feet wide, on one side of which was water and on the other marsh. Two tracks were laid over it. It is a matter of common knowledge that fifteen miles per hour is not more than one-half the usual speed between stations outside of cities and towns. No one would think such speed reckless or dangerous under ordinary circumstances over this road at that point. The defendant had a right to the use of its track, and may ordinarily presume that no one is upon it to be injured. It owes to persons wrongfully there no duty to look out for them that they may not be injured. Whatever duty it owes such persons arises after, and because they have been discovered there by its servants.

When the engineer first discovered the plaintiff, she was in the custody and control of her father, and was in the act of stepping from the track toward the other parallel track. The party did get off and reach a place of security. It is difficult to see why, under such circumstances, the defendant's engineer should have made any attempt to check the speed of the train. Counsel suggest, because of the fright to the child, which they assume should have been anticipated. But the child was apparently and in fact in the custody of a person of mature years, her father, who testified that he held her by the hand. Unfortunately she broke from him and ran in front of the engine. We do not think this could have been anticipated, or was caused by any negligence on the part of defendant's servants. As soon as she put herself in peril every possible effort was made to prevent the injury. So far, we think, negligence on the part of defendant could not be reasonably inferred from the circumstances.

But appellant's counsel contend that plaintiff was not wrongfully upon the roadway, but was there through the fault of defendant's servants, who carried her beyond her station in violation of the contract of defendant, and put her off at another point on their road, telling her that she could walk back. That there was no other way to reach the station save by the roadway, and therefore the acts of defendant's servants in failing to permit her to alight at Watt's Station, and leaving her at Emery Station, directly and proximately caused the accident.

The failure of defendant to permit plaintiff to alight at Watt's Station, leaving her at Emery Station instead, was a violation of defendant's contract for which plaintiff was entitled to an action for damages. She might have insisted upon her contract and perhaps have refused to alight anywhere else, or might have taken the next return train for Watt's Station, and insisted upon her right to be left at Watt's Station free of charge, but it is difficult to see how such wrong on the part of the defendant gave her a right to go back over the track to Watt's Station.

The real contention here is that defendant, having carried her beyond her destination and left her, the defendant must be held to have intended that she should walk to the station, and there being no other obvious way, the wrong of defendant was the proximate cause of the danger to which she was exposed, and as a child of six years cannot be guilty of contributory negligence the defendant must be responsible.

When it was said that there was no other way back, it must be understood that there was no direct way; we cannot suppose that Emery Station was entirely isolated from the general road system of the country. The testimony of plaintiff's father also shows that he knew that a return train was then expected upon which they could have taken passage.

The cases cited by counsel for appellant in support of this contention imposed by his contract, that is, to furnish a safe place for alighting are not applicable. *Hutchinson on Carriers*, which is referred to, says, section 617: "Such carriers must be equally careful not to pass beyond the alighting platform station, and thus to require or make it necessary for the passengers to alight without returning to it. When this has been done it is a breach of the carrier's contract, and the passenger may demand a return to the platform or station before leaving the train; and if the servant of the company in charge, without sufficient cause, refuse to return with him, but leaves him to get back by other means, the passenger will be entitled to an action and to the recovery of damages. . . . If there should be no demand to be taken back or refusal to do so, and no attending circumstances of aggravation, and the passenger voluntarily leaves the car, all that the passenger could rightfully claim would be compensation for the inconvenience to which he has been put. . . . But, nevertheless, where the pas-

senger is carried past the platform, or usual alighting place, and is required either expressly or impliedly to leave the car without assistance, and to find his way unaided to the station, during which time he receives injury, the carrier is liable."

This is evidently because the passenger was left in an unsafe position. This is made evident by the cases cited in its support. *N. Y. R. Co. v. Doane*, 115 Ind. 435. A lady passenger was carried some forty rods beyond the station and ordered to alight. The roadway was fenced by a wire fence. She discovered no way of getting out except to walk back to the station. In doing so she had to pass a cattle-pit, into which she fell. It is said: "It is also the duty of a railroad company to provide suitable stations and platforms to enable persons to enter its cars, and passengers to safely alight when they have accomplished their journey." It is also said that when passengers are required to alight at any other place than the platform, the company is liable for injuries received in leaving such place to the same extent as it would be for defects in its own premises.

The facts in this case and the reasoning of the court clearly show that it can have no application to the case in hand. *Adams v. R'y Co.*, 100 Mo. 555; *Winkler v. R'y Co.*, 21 Mo. App. 99, and *Franklin v. Motor Road Co.*, 85 Cal. 63, are of the same character and have only to be read to show their inapplicability to the case under consideration.

Here the plaintiff was left at a different station from that to which the defendant had agreed to carry her; but she was not left in a position of danger. When she left the car without asking to be carried back, and left where she ought to have been left, the contract relation between her and defendant ceased. She had a right of action against the company for the breach of their contract, but they owed her no special care because of it. It must follow that the failure to leave plaintiff at Watt's Station and carrying her to Emery Station was not the proximate cause of her injury.

The order denying the plaintiff's motion for a new trial is affirmed.

Hearing in Bank denied.

BEATTY, Ch. J., dissented from the order denying a hearing in Bank.

CARR V. EEL RIVER & EUREKA RAILROAD COMPANY. (1)

Supreme Court, California, May, 1893.

[Reported in 98 Cal. 366.]

DUTY TO STOP TRAIN AT STATION A REASONABLE TIME TO ALLOW PASSENGERS TO ALIGHT.—It is the duty of a carrier of passengers to stop the train a sufficient length of time at a station to enable passengers to get on or off in safety, and failing to do so, and injuries resulting to a passenger in the act of alighting, the carrier is guilty of negligence and is responsible in damages for the injuries caused by such negligent act.

CARE REQUIRED OF CARRIER.—A carrier for hire is bound to use the greatest care and diligence in the transportation of passengers consistent with the carrying on of his business.

JUMPING FROM MOVING TRAIN—NOT NEGLIGENCE.—It is not negligence *per se* for a passenger to jump from a moving train. It is for the jury to say whether the act was justifiable or not.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order denying a new trial. The facts appear in the opinion.

HORACE L. SMITH, for appellant, cited: *Hurt v. St. Louis*, etc. R.R. Co., 94 Mo. 255; 4 Am. St. Rep. 374; *Nunn v. Georgia R.R. Co.*, 71 Ga. 710; 51 Am. Rep. 284; *Sevier v. Vicksburg R.R. Co.*, 61 Miss. 8; 48 Am. Rep. 74; *New Orleans R.R. Co. v. Statham*, 42 Miss. 607; *Raben v. Central Iowa R'y Co.*, 74 Iowa, 732; *Central R.R. etc. Co. v. Letcher*, 69 Ala. 106; 44 Am. Rep. 505; *Jewell v. Chicago, etc. R.R. Co.*, 54 Wis. 610; 41 Am. Rep. 63; *Galveston, etc. R.R. Co. v. Le Gierse*, 51 Tex. 188; *Houston, etc. R.R. Co. v. Leslie*, 57 Tex. 83; *Lucas v. N. B. & T. R.R. Co.*, 6 Gray, 64; 66 Am. Dec. 406; *Morrison v. Erie R'y Co.*, 56 N. Y. 302; *Burrows v. Erie R'y Co.*, 63 N. Y. 556; *Penn. R.R. Co. v. Aspell*, 23 Pa. St. 147; 62 Am. Dec. 323; *Damont v. N. O. etc. R.R. Co.*, 9 La. Ann. 441; 61 Am. Dec. 214; *R.R. Co. v. Hendricks*, 26 Ind. 228; *Dougherty v. C. B. etc. R.R. Co.*, 86 Ill. 407; *Nelson v. A. & P. R.R. Co.*, 68

1. Cited in *Raub v. Los Ang. etc. R'y Co.*, 103 Cal. 473, 476, 2 Am. Neg. Cas. 214.

There is a note to this case in 21 L. R. A. 354.

sible in damages for all the injuries caused the passenger by such negligent act.

"7. Should you find from the evidence that on the fourth day of May, 1890, plaintiff was a passenger on the train of defendant from Alton to Rhonerville Station, that the train was stopped on its arrival at Rhonerville Station for passengers to leave the car; that immediately upon the stoppage of the train the plaintiff left her seat in the car, and went out upon the platform or steps of the car for the purpose of alighting; that the defendant started the train before the plaintiff had time to leave the car, and while she was on the steps of the car in the act of leaving it, without giving her notice or warning; and that the plaintiff was thrown from the car by its starting and injured without fault on her part then, in that event, I charge you that your verdict must be for the plaintiff for the damages sustained by her, not exceeding the amount claimed in the complaint."

The principle of law involved in the foregoing instructions is the same, and, considering them together, it is clearly stated and entirely correct. An elementary principle governing the conduct of common carriers of the character of appellant is contained in these charges of the court, and that is, it is the duty of a railroad company to stop its train at a station a reasonable time in order that passengers may get on and off its cars with safety to themselves. The court incorporates an additional principle into the instruction, to the effect that, if such common carrier does not stop its train for a reasonable length of time in order that passengers may get on and off, it is guilty of negligence in starting the train without notice or warning that it is about to start. It is first declared that the railroad company must stop at each station a reasonable time, and if injury results to passengers owing to its failure so to do, then it is guilty of negligence. Such being the law, and the soundness of the proposition cannot be doubted, the additional element incorporated into the charge of the court becomes self-evident as an unquestioned legal principle. The law demands of a common carrier of passengers for hire that he observe the utmost caution, characteristic of a very careful, prudent man. The carrier is bound to use the greatest care and diligence in the transportation of passengers, consistent with the carrying on of his business, and in view of these demands of the

45; *Chidester v. Con. D. Co.*, 59 Cal. 197; *Whitsett v. R.R. Co.* 67 Iowa, 150.

Garoutte, J.—Respondent recovered \$5,000 damages for personal injuries, claimed to have been sustained by her through the negligence of appellant, and this appeal is prosecuted from the judgment and order denying a motion for a new trial. The first count of the complaint relies for a recovery upon the theory that plaintiff, a passenger, was not allowed a reasonable time to alight from the train at Rhonerville, her point of destination, but that appellant negligently and carelessly started the train while she was upon the steps of the coach, preparatory to alighting, and thereby threw her to the ground, causing permanent injuries.

The second count of the complaint is based upon the allegations that appellant negligently carried its coach in which she was seated beyond the platform for the use of passengers alighting from the cars at said station, and stopped the said coach at an unsuitable place for passengers to alight therefrom; that respondent attempted to alight, but appellant failed to allow her a reasonable time within which to do so, and while she was upon the steps of the coach, attempting to leave the train, the coach was started, she was thrown to the ground, and the injuries received. The answer denies negligence upon the part of the railroad company and alleges contributory negligence upon the part of the respondent, in this, that she attempted to alight from the train while it was in motion, and after it had started from the station. There was some evidence offered by appellant tending to support its contention in this regard.

It is claimed that the law is not properly declared in instructions 6 and 7, which read as follows:

"6. It is the duty of the carrier of passengers to stop the train a sufficient length of time to enable passengers to alight in safety, and to hold the train still during such time. It is negligence for the carrier to start the train without warning passengers after making such stop, and before the passenger has had a reasonable time to leave the car. Should the carrier start the train while the passenger is on the steps of the car, in the act of alighting, without giving sufficient time to alight and without giving notice to the passenger, whereby the passenger is thrown from the car and injured, then the carrier is guilty of negligence, and is respon-

The legal principle enunciated in this instruction is attacked as not sound, appellant's position being that the act of a passenger in jumping from a moving train is negligence *per se*, with the exception that by the act of the carrier the passenger has been placed between two dangers, or that some situation was created by the carrier which interfered with his free agency, and created in his mind a confidence that the attempt to leave the moving train could be made in safety. There is nothing in the record involving the question of the exercise of an immediate judgment upon the part of the respondent as to the choice of one of two impending dangers, and therefore we eliminate that element from the case. The remaining exception stated by appellant to the general rule upon which he relies is not made plain to us by counsel; neither do we find it recognized in the books. Appellant's claims in this regard are drawn from the facts of certain cases where the passenger has been injured in alighting from a train at the suggestion of the brakeman or conductor. Such was the case of *Filer v. N. Y. Cent. R.R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; but that case and others, which as to the facts are found in company, do not recognize the rule of negligence *per se* by reason of alighting from or boarding a moving train, and do not base their respective decisions upon an exception to such rule by reason of the advice or suggestion of one of the employees of the company. A passenger's act in jumping from a moving train may be grossly negligent, and thereby release the carrier from all liability, notwithstanding it was done at the suggestion or upon the assurance of safety by the employee. The employee's advice at the moment is in no sense conclusive upon the passenger as to his negligence or non-negligence in jumping from the train. Like other circumstances surrounding the transaction, it casts some light upon the scene, and thereby aids the court according to the power and brilliancy of its light in each particular case to determine what a careful, prudent man would have done, placed in the position of the unfortunate passenger. This is all that is decided in the *Filer* case, and in no sense does the doctrine there declared form an exception to any general principle found in the law of negligence.

The earlier cases in many instances recognize the principle of negligence *per se* in alighting from a moving train, but modern authority to a great extent has supplanted that doctrine with

broad views upon the question. In this case the court carefully and fairly stated to the jurors what in law would constitute "negligence" and "contributory negligence" upon the part of the respondent, and with that law in their possession remanded them to the jury room to find the facts, and apply the law to the facts. Under the conditions surrounding respondent immediately prior to the injury, and to which we have already adverted, conceding the company's claim that respondent jumped from a moving train, still we think the case without question justified the instructions of which complaint is now made. No trial court would be authorized to grant a nonsuit upon the facts, and such being the case, the instruction was properly given.

Vol. 2 of the Am. & Eng. Ency. of Law, 762, says: "When a passenger, on having been set down or taken up at the station to or from which the railway has contracted to carry him, is injured in the attempt to board or leave a moving train, the railway is liable if the person injured in getting on or off the train did not incur a danger obviously apparent to the mind of a reasonable man." In the Filer case the court supports the foregoing doctrine as follows: "That there was more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest is self-evident; but whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party by the wrongful act of another has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for a jury, whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard." In the well-considered case of *Johnson v. Westchester & P. R.R. Co.*, 70 Pa. St. 357, the trial court indorsed the principle of negligence *per se*, and the Supreme Court said: "Instead, therefore, of the rule laid down by the learned judge, he should have left it to the jury to say, under all the circumstances in evidence, whether the danger of boarding the train when in motion was so apparent as to have made it the duty of the plaintiff to desist from the attempt." To the same effect is the *Louisville & Nat. R.R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443, where the party jumped from a train moving at the rate of four and a half miles per hour, and that was held not to

be negligence *per se*. See also Cent. R.R. & B. Co. *v.* Miles, 88 Ala. 256; Nichols *v.* Dubuque & Dak. R'y Co., 68 Ia. 732; Penn. Co. *v.* Marion, 123 Ind. 422; 18 Am. St. Rep. 330.

Among other cases relied upon to support appellant's position is Jewell *v.* Chicago, etc. R.R. Co., 54 Wis. 610; 41 Am. Rep. 63. That case is opposed to the views we have expressed and to the authorities we have cited. It does not state the better doctrine, and many of the decisions from other courts upon which it relies for support are not in line with it upon the facts.

We notice no other matters in the record demanding our attention.

For the foregoing reasons let the judgment and order be affirmed.

RAUB *v.* LOS ANGELES TERMINAL RAILWAY COMPANY.

Supreme Court, California, August, 1894.

[Reported in 103 Cal. 473.]

INJURED WHILE ALIGHTING FROM TRAIN.—In an action for injuries where the evidence tends to show that the station where the plaintiff alighted is a regular station at which passengers were accustomed to get on and off every day and that the plaintiff had been informed by the conductor that he always stopped there, that when the train reached the station it stopped a short distance beyond the platform, and while the plaintiff was in the act of getting off and had reached the lower step of the car, the train started without any warning, and she was thrown to the ground, the granting of a nonsuit is improper.

APPEAL from judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. The facts appear in the opinion.

J. L. MURPHY, for appellant.

BURNETT & GIBBON, for respondent.

Harrison, J.—The plaintiff took passage upon a car of the defendant to be transported from Glendale to De Camp station. De Camp station is a station upon the road of the defendant, within the limits of the city of Los Angeles, and is printed upon the published time-table and list of its stations. The defendant does not issue tickets from Glendale for that station, but for all stations or

stopping places within the limits of Los Angeles tickets are sold to Los Angeles. The trains of defendant always stop at this station, and passengers are accustomed to get off and on at that place. The plaintiff had frequently taken passage from Glendale, had got off and on at this station, and had been informed by the conductor that he always stopped there. On the morning of May 6, 1892, she purchased a ticket at Glendale for Los Angeles, and took passage on the defendant's road. When the train reached De Camp station it stopped a short distance beyond the platform, and while the plaintiff was in the act of getting off, and had reached the lower step of the car, the train started without any warning, and she was thrown to the ground and received injuries for which this action was brought. At the trial the court granted a nonsuit, and the plaintiff has appealed.

We think that the nonsuit should not have been granted. Whether the plaintiff was entitled to a recovery depended upon her ability to show that her injury resulted from negligence on the part of the defendant. The negligence of the defendant in the present case was not attempted to be shown by any single act or omission whose import or character was in no respect uncertain, but was an ultimate fact resulting from other facts and circumstances in the case, and was to be ascertained upon a consideration of these facts and circumstances viewed in connection with the respective relations of the parties. In such a case the issue of negligence is so much a question of fact, or is so dependent upon the determination of controverted facts that its existence must be left to the jury.

It is the duty of a railroad corporation to afford a reasonable time for passengers to alight from its cars at the station to which it has assumed to carry them, and if a passenger is injured while attempting to alight at such station, by reason of the sudden and unannounced starting of the train, the burden is thrown upon the company of showing that the injury was not the result of its own act or negligence. The defendant's permission to its passengers to get on or off its trains at De Camp station would counteract its claim that the plaintiff was negligent in attempting to get off at that station, and the fact that passage tickets which it sold for Los Angeles were recognized by it as equally available for all stations within the limits of Los Angeles must be considered as a permission, if not an invitation, to get off at any of those stations.

The defendant cannot avail itself of the failure of the conductor to announce the station before reaching it as evidence of negligence on the part of the plaintiff. The evidence tended to show that it was a regular station upon the road at which passengers were wont to get on and off every day, and, as the plaintiff had always been informed by the conductor that he always stopped there, she was authorized to consider the stopping of the train at the station as an invitation by the defendant to get off. We held in *Carr v. Eel River R.R. Co.*, 98 Cal. 366, that it was not negligence *per se* for a passenger to get off from a moving train that had carried him beyond the station called for by his ticket, and under the principles of that case it cannot be considered to have been negligence on the part of the plaintiff herein to attempt to get off the train after it had stopped at a point beyond the platform. Under the principles of that case the question of the plaintiff's negligence should have been submitted to the jury.

The judgment and order denying a new trial are reversed.

DENVER, SOUTH PARK & PACIFIC RAILROAD COMPANY v. PICKARD. (1)

Supreme Court, Colorado, December, 1884.

[Reported in 8 Colo. 163.]

TIME-TABLE NOT CONCLUSIVE EVIDENCE.—A time-table which, on its face, announces that it is for the information of employees only, and in terms reserves to the company the right to vary therefrom at pleasure, and contains also an explanation that flag stations are designated by a star, is not of itself sufficient to show that a station on it had been advertised either to the public or to the plaintiff as a regular passenger station because it failed to be designated by a star.

INJURY TO PERSON BOARDING MOVING TRAIN AT A PLACE NOT A STATION.—When there is no evidence that passengers ever got on or off trains in motion at a certain place by invitation or direction of the employees of the railroad, although it appeared that the trains slowed up there to take on the mail, the company will not be liable for injuries received by a person who endeavors to board a moving train at that place.

1. Cited in *Lord v. Pueblo S. etc. Co.*, 12 Colo. 390, 394; *Brasher v. D. & R. G. R. Co.*, 12 Colo. 384, 389.

APPEAL from District Court of Chaffee County. The facts appear in the opinion.

TELLER & ORAHOOD, for appellant.

BROWNE & PUTNAM, for appellee.

Beck, Ch. J.—This was an action against the railroad company for damages alleged to have resulted to the plaintiff from its negligence.

Judge Cooley says: "Where negligence is the ground of an action, it devolves on the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover." Cooley on Torts, 673.

The plaintiff's injury, complained of in this case, was serious and permanent, and by the verdict of the jury and judgment of the court he was awarded, as damages therefor, the sum of \$25,000.

The first question presented for our consideration is, whether the court erred in denying the motion for nonsuit, interposed by defendant's counsel, at the close of plaintiff's direct testimony.

A proper determination of this question involves the decision of two other legal questions arising upon the facts in evidence, viz. :

First.—Was the station, Divide, where the injury was received, a regular passenger station on the defendant's road, where its trains were legally obliged to stop for passengers?

Second.—Did the legal relation of carrier and passenger subsist between the parties at the time of the injury?

In support of the proposition that Divide was a regular passenger station, plaintiff introduced in evidence, against the objections of the defendant, a time-table issued by the officers of the railroad company, and which went into effect on the day of the accident. The heading was as follows:

"The Denver, South Park & Pacific Railroad Time-table, No. 37. To take effect Thursday, October 21, 1880, at 12:15 o'clock A. M. For the government of employees only. The company reserves the right to vary therefrom at pleasure."

The table contains the names of the various stations upon the line of defendant's road, including the station Divide, with the

times of the arrival of trains thereat. In a note at the bottom it is stated that flag stations are designated by a star. The station in question is not so marked.

While the evidence was admissible, in our judgment, in connection with other facts bearing upon the question, it falls far short of proving the fact sought to be established.

It does not purport to be an advertisement for the information of the traveling public, but, on the contrary, every person into whose hands such card may fall is advised against such a conclusion, and that it cannot be relied upon for such purposes.

In *Beauchamp v. I. & G. N. R'y Co.*, 56 Tex. 239, it was held that a time-table which, on its face, announces that it is for the government and information of employees only, and, in terms reserves to the company the right to vary therefrom at pleasure is not admissible in evidence in a suit for damages against the company for not stopping at a place mentioned therein. Perhaps that ruling is not applicable here, owing to the fact that other evidence was submitted upon the same point.

Plaintiff testified that the company's station agent at Buena Vista, where plaintiff resided, and where he held the office of postmaster, gave him one of these cards, on the day preceding the accident, to be used in making up the mails. Joseph Nevitt, deputy postmaster at Divide, testified that Divide was a regular station, but his answers to a few questions disclose his ignorance of the subject:

Q. "Did the trains always stop there?"

A. "Whenever they felt inclined."

Q. "What do you call a regular station and a flag station?"

A. "I am not railroad man enough to define it."

Q. "And you think you are able to say positively that was not a flag station?"

A. "I am, by their own actual time card."

He further testified that defendant's master of transportation, John McCormick, had previously declared to him that Divide was a regular station; that it was the duty of engineers to stop their trains there, and requested the witness to report those who did not do so.

It does not appear that the declarations of McCormick had been communicated to the plaintiff, so they certainly did not

conduct. Nor did the fact that one of these cards was given to him for the special purpose mentioned, by an employee of the defendant, previous to his injury, warrant him, in view of the advisory advice therein contained, in relying upon it for any other purpose.

The plaintiff's testimony disclosed other facts with which the defendant was acquainted, and which have an important bearing on the case.

There was at this station neither a station house, ticket office, nor baggage room. No tickets were sold here for any point on the railroad. There was there a station agent or a railroad employee in charge. There was a platform beside the track, such as were to be found at other stations, but even this did not belong to the carrier. The witness Nevitt stating that it was his own private property. The latter fact is not material, however, since the carrier was not bound when it had occasion to do so. Plaintiff's witnesses testified that trains did not regularly stop at this station, some of them stopping it was necessary to flag them to have them stop. The plaintiff's testimony was wholly insufficient to show that the station had been advertised either to the public or to the plaintiff as a passenger station. It certainly does show that it was not such.

The relation which the plaintiff bore to the railroad was that of a passenger. His counsel insist that going upon the platform with the intention of taking the train and paying his fare, constituted the relation of carrier and passenger between the parties. The plaintiff testified that he held no ticket, but he testified to his ability to pay the fare, which counsel say was sufficient.

In support of the proposition that plaintiff sustained the relation of carrier and passenger, the following is quoted from *Shear. & Redf.* 162: "Any acts indicating on the one side an offer or request to be carried, and on the other an acceptance or request are sufficient. It is not necessary, in order to establish the relation of carrier and passenger, that the latter actually entered the vehicle, much less that it should be completed on the journey without him."

Other facts of the same action are germane to the facts of the case, viz.: "A passenger is a person who undertakes, with the consent of the carrier, to travel in the conveyance provided by the carrier."

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latter. . . . Where the carrier provides a waiting room for passengers, entry into that room, with intent to travel under the carrier's charge, is sufficient to give the rights of a passenger. Where it is the practice of the carrier to stop for passengers when hailing, the fact that he stops for a passenger hailing him is sufficient evidence that he accepts such person as a passenger, and from that moment the relation begins."

The rule of this section would not seem to include a case where no waiting room was provided, no tickets sold, and where the carrier did not stop for the passenger, and where the plaintiff is unable to testify or prove that the carrier was aware of his intention to get upon the train.

Counsel also quote to the same proposition the following detached sentences from Hutch. on Carr. : "Payment of fare or purchase of ticket not required." Secs. 565-8. "Waiting at station for expected train is enough." Sec. 559. "Relation arises without privity of contract." Sec. 567. "Averting a reading to pay fare is sufficient." Sec. 565, note 2.

A reference to the foregoing sections shows that these general expressions are materially qualified by the context; for example, sec. 565: "Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier." Sections 566, 567 relate to the carrying of persons gratuitously and upon free passes. The authorities referred to in note 2, sec. 565, relate to cases where passage is taken without prepayment.

It is apparent that these citations do not sustain the proposition.

The rules cited in Thom. Carr. of Pass. 43, are equally inapplicable to the facts in the case before us. It is there said that payment of fare is not necessary to create the relation, but that going into the depot or waiting room of a railway company and waiting for the means of conveyance, with a *bona fide* intention of becoming a passenger, or upon a steamboat, in good faith, to take passage thereon, creates the relation, although no fare has been paid.

But it is claimed that a custom existed at this station, for which the defendant is responsible, and which, in connection with the

ven, brings the case within the rules of the foregoing

s.
leged that it was the practice of the defendant's em-
slow up the trains in passing this station so that pas-
ould get on or off, as they desired, and that travelers,
or becoming informed of the custom, frequently availed
s of it; that the plaintiff had been told of this cus-
that trains frequently passed by without stopping, and
ust be prepared to get aboard the train while in motion.
argued that a custom to slacken speed for the purpose of
passengers to get on and off moving trains is equivalent
station to do so, and renders the carrier liable for injur-
ed in an attempt to comply therewith.

stance of the plaintiff's testimony on this point was that
persons residing at Divide told him that trains frequently
hout stopping, and that he would have to look out and
ile the train was in motion; that passengers frequently
this.

Hewett swears that he told plaintiff that there had been
when the train passed by and left passengers, and it
well for him to be on the alert. He also stated that he
veral instances where persons had got on and off mov-
at the station, but did not know whether it was done
ssent of the officers of the company or not.

who had resided there ever since the road was built, said
nessed similar instances, but did not know whether it
ular custom or not. He had noticed that the trains
up to take on the mail.

ur jumped off the train once at Divide while it was in
d at another time was carried two miles past.

new nothing of the custom, but mentioned two instances
ains failed to stop for him at this station.

ess was able to swear to an instance where a passenger
off a train in motion by invitation or direction of
s employees. This being the state of the proof, and
g that the slowing-up may have been for other pur-
those alleged, we think the proof of the custom men-
insufficient to establish it. It remains to inquire
he facts and circumstances, transpiring immediately

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prior to the accident, justified the plaintiff's attempt to jump upon the train.

Deputy Postmaster Russell accompanied the plaintiff to the platform, carrying the mail to be sent off, and a lantern to signal the train.

The train arrived from Denver that evening at 6 o'clock.

After it appeared around the sharp curve to the north of the station, Russell swung his lantern across the track, as a signal to stop, and one whistle was blown from the engine, which plaintiff says was in response to the signal. The train slowed up a little. Russell set down the lantern, and, picking up the mail sack, held it out for the mail agent as the train passed by, but he failed to get it. The train did not stop, and the plaintiff attempted to get upon the front end of the rear car as it passed the platform. He caught the iron railing with his left hand, the iron handle on the end of the car with his right, and put his right foot on the car step; just at that moment, and as he was about to raise to the platform, the car was violently jerked by letting off brakes or putting on steam, and plaintiff was hurled underneath the platform and his left arm so crushed by the rear truck, which passed over it, as to require amputation.

The authorities say that circumstances may exist which will make it a question for a jury, whether an attempt to get upon a train in motion constitutes such negligence on the part of a passenger as to bar an action for injuries received in such attempt.

Judgments for damages have been sustained in such cases where there has been gross misconduct on the part of the railroad company, as in failing to give necessary time for passengers to get upon the train before setting it in motion; failing to come to a full stop at a regular station where passengers are to be taken on or let off, and where great emergency exists for passengers to proceed on their journey; also, where invitations or directions are given to passengers, by railroad employees, or by existing customs of railroad companies, to get on and off their trains while in motion. But these are cases where plaintiffs were clearly entitled to the rights of passengers; and, moreover, the trains were moving very slowly in all such cases.

In reviewing the case made by the plaintiff, we are of opinion that it does not contain the elements essential to a recovery. It

appear, except inferentially, that anyone upon the train of the plaintiff's desire to get aboard. As the train the plaintiff neither spoke nor made sign to anyone company's trainmen of his desire to get on, nor did he any encouragement to do so, unless by the checking of the train approached. He did not even prove that the sound from the engine was the stop signal in use by any. The witness Glassbrook, who had been a railroad and who was present and witnessed the accident, stated he heard the station signal and saw the lantern waved, but he did not remember any response to the flagging.

As to the rate of speed at which the train passed the plaintiff and his witnesses made different estimates. The plaintiff's estimate was six to eight miles per hour; Joseph O'Neil's estimate five miles per hour, and O'Neil's four and a half

As already mentioned, it seems to have been running so fast that the mail agent on board failed to get the mail held out to

Proof of failing to show an obligation to stop regularly at this station, that the plaintiff's desire to become a passenger was known to the company's agents, it is difficult to perceive wherein there was such palpable misconduct on the part of the defendant as to make it liable in damages, or to justify the risk to life or limb taken by the plaintiff.

The plaintiff had some previous experience in getting on and off the train while in motion, and says he knew the danger attending such attempts. He knew that the sudden checking and starting of the train, accompanied with more or less jerking of the coaches, a fact testified to by his witnesses, and it is very doubtful if the circumstances of emergency under which he acted would have justified him in taking as great a degree of risk than he took.

The plaintiff came to Divide the day previous in a buggy, and concluded to travel by train. Being Postmaster of Buena Vista, his anxiety to get home was on account of his official business, which was well understood by those left in charge of the office. He testified, however, that the drive by horse and buggy could be made in two hours, and that he presumed he could have driven home as well as not and have driven home.

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In *Hutch. on Carr.* § 641, it is said: "Thus, nothing is more universally agreed upon, perhaps, than the attempt to get upon a railway train whilst in motion without a necessity for doing so induced by the conduct of the employees of the railway company, and without an invitation to do so from its agent acting in the line of his duty, precludes the passenger from the right to recover for the injury which may be thereby occasioned."

That the necessity for taking such risk, and that circumstance relied upon in the present case as constituting an invitation to get on, do not bring the case within the exceptions mentioned, is shown by a subsequent portion of the section: "Nor will refusal to stop the train, nor the custom of those in charge of the train to slacken its speed at the particular station, in order to take on passengers without coming to a stop, excuse the negligence of the party. . . . If it had adopted a practice of receiving its passengers while in motion, it would be reckless conduct on the part of the company, or of those in charge of its trains, which would not justify or excuse the equally reckless imprudence of the injured party."

The authorities which recognize the right of passengers, under certain circumstances, to rely and act upon the invitations and directions of duly authorized agents of railway companies, limit the doctrine to cases which do not involve the element of recklessness. Thus, in *Pierce on Railr.* 329, the author says: "But, notwithstanding such direction, invitation or assurance, the plaintiff will not be excused in following it if the act involves a reckless exposure of himself, or is one which a man of common prudence would not do. A mere permission from the company's servant to do a dangerous act does not relieve the injured person from the responsibility for its consequences."

Analogous cases, held proper for the consideration of juries are cases wherein the relation of passenger and carrier clearly appears, and the trains are moving very slowly.

If a passenger holds a ticket entitling him to alight at a particular station where the train stops, but not long enough to afford him a reasonable time to alight, and he attempts to do so before the motion has become at all rapid, and while the act would not seem dangerous to a man of ordinary prudence, but nevertheless he is injured thereby, it is held that he is entitled to damages.

action is the flagrant breach of duty on the part of I. C. R.R. Co. *v.* Able, 59 Ill. 131.

A passenger holding a through ticket arrived at the station where the connecting train was standing, but without giving notice to change cars it started out, and in his effort to get on the second train he fell and was injured, the Supreme Court said it was a case for the consideration of a jury. The motion of the defendant for judgment was so slow as to be only distinctly perceptible on the outside of it. *Johnson v. W. C. & P. R.R. Co.*, 70 Pa. 401; *also, Filer v. N. Y. C. R.R. Co.*, 49 N. Y. 47; *Phil. & D. S. R.R. Co.*, Id. 177.

The statement of the rule which has been favorably cited in this case is when a passenger is called upon to choose between two courses of action, one of which the neglect of the company has exposed him, and the other presents some degree of danger, but not such as he could avoid without imprudence, encounter; if by adopting that course he suffers any injury it is the proper subject of an action against the company. *Kelley, C. B.*, in *Siner's case*, L. R. 10 Q. B. (1).

It is possible to hold that the facts disclosed by the plaintiff's evidence in this case within the rules announced. On the contrary, it affirmatively appears, from his own evidence, that a lack of due prudence upon his part was the proximate cause of the injury complained of. The motion for nonsuit, therefore, should have been sustained. *Behrens v. K. P. R'y Co.*, 5

The testimony on the part of the defendant is considered in the light of the circumstances and is still more unfavorable to the cause of the plaintiff. The trainmen all concur that the swinging of the lantern was not seen at all, and that no stop signal was sounded, such as the blowing of two short blasts of the steam whistle. They further testify that the whistle, up to that time, was used as a flag station, and not as a regular passenger station.

A conclusion upon the whole case is inevitable, that the plaintiff, in not seeing the danger of his position, failed to exercise ordinary care, and for that reason is not entitled to recover. If recovery could be sustained, the damages awarded are

facts of this case, see note 1 on p. 178, *ante*.

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manifestly excessive, and the judgment would have to be reversed for that reason alone.

As to the instructions, it is only necessary to say that, in so far as they are inconsistent with the views above announced, they are held to be erroneous.

Judgment reversed.

THE DENVER & RIO GRANDE RAILROAD COMPANY v. HODGSON.

Supreme Court, Colorado, September, 1892.

[Reported in 18 Colo. 117.]

DUTY OF A RAILROAD COMPANY TO PROVIDE A SAFE PASSAGE FROM THE TRAIN TO THE STATION.—A railroad company owes a peculiar duty to a passenger for hire. It is bound to exercise the highest degree of care and skill reasonably practicable in the management of its trains. This duty does not cease upon the arrival of the train at the passenger's destination: the company is bound to furnish him an opportunity to safely alight and to use the utmost care in providing a safe passage from the train to the station platform.

GROSS NEGLIGENCE TO RUN TRAIN ON TRACK BETWEEN STATION AND OTHER TRAIN DISCHARGING PASSENGERS.—It is grossly negligent for a railroad company to run a train, without notice, at a high rate of speed between a train from which passengers are alighting and the depot, and the company will be liable for the death of a passenger who was killed by the train on the track that he was crossing in an endeavor to reach the depot.

PASSENGER CROSSING TRACK AT THE STATION NOT REQUIRED TO LOOK AND LISTEN.—The obligation which rests upon a traveler upon the highway to stop, look and listen, before crossing a railroad track, does not apply to a passenger in passing from the train to the depot.

APPEAL from the District Court of Arapahoe County. Action for personal injuries. Judgment for plaintiff. Appeal by defendant. The facts appear in the opinion.

WOLCOTT & VAILE and HENRY F. MAY, for appellant.

RALPH TALBOT, for appellee.

Hayt, Ch. J.—This action was commenced by the appellee in this court, Sarah R. Hodgson, to recover damages resulting from the death of her husband, Alfred E. Hodgson.

t, 1889, the deceased was a passenger for hire on one of the numerous trains operated by the appellant company between the city of Denver and the town of Littleton, ten miles distant. The evidence shows that the train upon which the deceased was conveyed to the town of Littleton reached that town at the depot, and was halted upon the side-track near the depot, for the purpose of discharging passengers, etc.; that the main track of the appellant company lay between this side-track and the depot buildings. About the time of the arrival of this train, another train from the opposite direction passed the station at a high rate of speed, on the main track. The train upon which the deceased was a passenger is referred to by witnesses as No. 3, and the other train as No. 8. The engine of train No. 8 struck the deceased, who was crossing the main track at the time it was passing the station, inflicting injuries upon him from the effects of which he died soon thereafter.

The evidence leaves it in doubt as to whether the deceased was on the main track at the time of the accident was passing from No. 3 to the depot platform, or whether he had already reached the depot and was about to return across the main track, for some reason not stated. The principle contention upon the trial was over this point, and although the jury took the view that he had reached the depot at the time of the accident, the opposition is urged with much force in this court. The jury returned a verdict for the plaintiff for the sum of \$5,000, and also found the following facts in answer to the following special inter-

Do you find from the evidence that the deceased was on the main track at the time the engine drawing train No. 8 while he was passing from train No. 3 to the depot platform at Littleton station?

Do you find from the evidence that the deceased was on the main track at the time the engine drawing train No. 8 after he left train No. 3 to the depot platform, and had returned again to the main track?

Do you find from the evidence that there was sufficient time between the stoppage of train No. 3 and the passing of train No. 8 for the deceased to pass from said train to the main track?

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No. 3 to the depot platform at the station in safety, had he exercised reasonable care under the circumstances in so doing?

"A. No."

The principal, and we may say the only contention in this case on the part of the appellants is that special findings of fact are not supported by the evidence, it being practically admitted that if they are the judgment cannot be disturbed. It is contended by the appellants that there is no evidence showing or tending to show that the deceased was struck by train No. 8 while he was passing from train No. 3 to the platform. The accident occurred at night, there were no lights about the depot, other than the train lights, and this, no doubt, accounts in a measure for the uncertainty of the testimony. In support of the special findings of the jury the appellee relies principally upon the testimony of two witnesses, viz. Daniel Shuckhart and F. W. Shuckhart, with possibly some slight corroboratory evidence from the cross-examination of the defendant's witnesses.

The witness Daniel Shuckhart (a lad of sixteen years of age at the time of the accident) testifies that he was standing at the section house, about eighty-five yards from the depot, when train No. 3 came in on the side-track; that, with another boy, he ran to the side of this train, trying to get on it to secure a ride; that he did not get on the train, because it was running too fast, but ran alongside of it; that he went running and walking, about fifty yards, when the sound of the danger signal, from the engine of No. 8, startled him, and he ran across the track, thinking they were signaling at him, and then passed down to the depot, and saw them picking Hodgson up. Upon being interrogated further, the witness expresses the opinion that he was about twenty seconds going from the point at which he tried to board the train to the point where he heard the danger signal; that he was running most of the way. He could not tell whether the train from Denver had stopped before the man was struck, or not, but it had stopped before he (witness) stopped running when he heard the danger signal, and that train No. 8, going towards Denver, then passed by. When required to estimate the time between the arrival of No. 3 and the coming of No. 8, he said that he thought it was a minute, or less.

The witness, F. W. Shuckhart, testified that he was station-

telegraph operator for the Atchison road, but that he has previously been an employee of the Denver & Rio Grande Company. He stated that he had been railroading about twenty years; that he was not acquainted with Mr. Hodgson, and had no interest in the case in any way; but he was at Littleton on the main line of the Rio Grande track when the accident occurred. He states that he saw train No. 8 approaching; that it was then standing 150 feet away from the track; that train No. 3 and train No. 8 arrived almost simultaneously; that the distance was so short from one train to the other, that he would not have been able to measure it. The witness also testified that, in his opinion, train No. 8 was running at the rate of twenty-five miles per hour at the time. Although the evidence of these witnesses as to the time of the arrival of train No. 8 with reference to the arrival of train No. 3 is in conflict with the evidence of other witnesses introduced by the defendant, who swear that only two or three minutes elapsed between the time of the arrival of the two trains, some of whom swear positively that Hodgson was on the depot platform and was re-crossing in the direction of the train at the instant of the accident, we do not feel that this evidence is sufficient to reverse the judgment.

From this, it is shown that none of these witnesses had any personal acquaintance with the deceased, and it is not clear that any one of them saw him at the instant of the accident, although they saw a man whom they thought to be Hodgson on the depot platform just prior thereto. It is quite likely that the man was not Hodgson at all, but some other person. The fact that the body of Hodgson was picked up, opposite the depot, and with evidence that he was not thrown or carried forward any perceptible distance by the train, is a circumstance which naturally tends to convince the jury that a mistake in identification was probable.

The case has been twice tried with the same result. Two juries, after deliberation and oath, have found against the defendant upon these facts. Added to this, we have the weight of the opinion of the court in support of the last verdict, whose opinion is always entitled to great respect on account of the peculiar opportunities which it affords of observing the witnesses while upon the stand, their manner of testifying, and their apparent candor, or lack of candor,

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etc. Every experienced judge knows that a multitude of circumstances occur in nearly every trial that justly have weight with both court and jury that cannot be transferred to the record in such manner as that they may be given due consideration upon appeal. And although the appellate tribunal reviewing the record may be dissatisfied with the verdict, the judgment will not be reversed, as not warranted by the proof, where there is legal evidence to sustain it. Greater freedom is allowed the trial judge in this respect, and this authority should be fearlessly exercised. *Union Depot & R. Co. v. Smith*, 16 Colo. 361; *Aspen Times Co. v. Russell*, 18 Colo. 75; *Cluverius v. Comm.*, 81 Va. 787.

The appellant, a common carrier, owed a peculiar duty to the deceased, a passenger for hire. It was bound to exercise the highest degree of care and skill reasonably practicable in the management of its trains. This duty did not cease upon the arrival of the train upon which the deceased was a passenger at the place of his destination. The company was still bound to furnish him an opportunity to safely alight therefrom, and to use the utmost care and diligence in providing for him a safe passage from the train to the platform of the depot.

The company in this instance is shown to have been grossly negligent in running an express train, without notice, at a high rate of speed. between the train from which passengers were alighting and the depot. Ordinary prudence should have suggested a different arrangement of its schedule in the first instance, and failing in this, its employees should have given sufficient warning. The deceased continued to be a passenger until he had at least an opportunity to reach the platform, and he had a right to rely upon the presumption that the company would not expose him to unnecessary peril in so doing. The obligation which it has been held rests upon a traveler upon the highway to stop, look and listen, before crossing a railroad track, does not apply to a passenger in passing from the train to the depot. *Greyson v. Old Colony & N. R.R.*, 100 Mass 215; *Klein v. Jewett*, 26 N. J. 474; *Gonzales v. N. Y. & H. R.R. Co.*, 39 How. Pr. 407.

The judgment of the District Court is affirmed.

VER TRAMWAY COMPANY v. OWENS.

Supreme Court, Colorado, April Term, 1894.

[Reported in 20 Colo. 107.]

NG FROM CABLE CAR—NEGLIGENCE.—Where a cable
ps for a passenger to alight, it is negligence on the part of the
d company to start the car while such passenger is alighting; but
passenger steps from the car while it is going at any such rate of
as eleven miles per hour, such act is gross contributory negligence
part of the passenger.

EW TRIAL MAY BE GRANTED.—A judge may properly
a new trial where he is convinced that the jury have not fully
ehended, or fairly considered, the evidence, even though he would
justified in directing a verdict.

AS TO NEGLIGENCE.—Instructions should not be too general,
given in the abstract, and the whole charge upon the same subject
be considered together, and where such instructions advise the
early and in the concrete, the abstract propositions do not neces-
make the charge erroneous.

S—CHARGE TO JURY.—The jury are not under all circum-
the sole judges of the credibility of the witnesses nor of the weight
given to their testimony, the court sometimes directing a verdict
the evidence; but where it is proper to submit a case to the jury,
t reversible error to charge them that they are the sole judges, etc.
uctions as to weight of evidence, impeachment of a witness, and
e as to professional communications are also discussed in the
n.

t. from the District Court of Arapahoe County.
for personal injuries occasioned by negligence in the
of a street railway car. Judgment for plaintiff. Defend-
ls.

bruary 4, 1889, about nine o'clock in the evening, the
Ann Owens, took passage on one of defendant's cable
e corner of 15th and Stout streets, to be carried to the
Colfax Avenue and Race Street. The conductor did
the gripman to stop before reaching Race Street; but
aving passed Race Street, plaintiff signaled the conductor
e car, and he thereupon rang the bell for that purpose.
a closed car, with gripman in front and passengers'
at the rear. Plaintiff testified that upon the conductor's
e car stopped; that she arose and walked to the rear

end of the car, and as she did so, asked the conductor complainingly why he always carried her past her place; she testified positively that the car stopped *still*; that she went out upon the rear platform to alight. As she got off it appears that she was thrown violently to the ground.

That plaintiff in alighting from the car was thrown to the ground and thereby rendered unconscious the greater part of the time for several days thereafter, is not disputed. She was undoubtedly seriously bruised and injured by the fall. Her attending physician testified that her skull was fractured; that her health had been thereby greatly impaired; and that her injuries were likely to be permanent. Other physicians, having examined plaintiff, expressed the opinion that her skull was not fractured and that she was not so seriously injured.

At the time of the accident plaintiff was a domestic servant; she testified that before the accident her health had been good, and that she had been regularly employed for good wages. The evidence tended to show that since the accident she had, by reason of her injuries, been unable to take care of and support herself or do any work for any considerable length of time. The trial now under review occurred more than three and a half years after the accident.

It is conceded that the car had been running at the rate of eleven miles per hour previous to the accident; and the testimony in behalf of defendant is positive that the car did not slacken its speed at all before the accident. The gripman testified that the signal having been given after the car passed Race Street, he treated it as a signal to stop at the next street (Vine Street), and so did not slacken speed. The conductor testified that plaintiff stepped off while the car was moving at its full speed. Thus, the distinct issue was presented at the trial: Was the car stopped for plaintiff to alight, and was it started again while she was in the act of alighting; or did she get off while the car was running at the rate of eleven miles per hour?

At the time of the accident the only persons upon the car were the gripman, the conductor, the plaintiff and two other passengers (a colored man and his wife). It is undisputed that plaintiff got off the car at the alley, that is, midway between Race and Vine streets; she was found lying at that point unconscious.

ely after the accident. The length of the block between d Vine streets (including the alley) is 266 feet. The and the conductor testified that the car did not stop passed Race Street until it reached Vine Street, or near et, and that the car did not slacken its speed at all until assed the alley between these two streets.

colored man testified that he supposed the car was going speed when the accident occurred, but was not paying h attention; that the car finally stopped about twenty- hirty feet before reaching Vine Street. The colored testified that she had not noticed that the car stopped ss Owens went out.

nductor was the first to reach plaintiff at the place where allen. He testified that her feet were nearest the track her head lay toward the east, that is, in the direction the oing, but more to the south than east. He had raised to a sitting posture, and was thus supporting her when witnesses arrived.

shown in evidence that plaintiff, in company with her iss Sphor, called upon the colored man and his wife month after the accident to ascertain their recollection of er. In rebuttal, the proper foundation for impeaching y having been laid, Miss Sphor testified that the colored his wife then said, in substance, that the car had stopped ntiff went out to get off. So also, in rebuttal, and as ng testimony, Miss Keiser testified that the colored ad told her some weeks before the trial that the conduc- the bell and that the car stopped before plaintiff got out. trial, the court, after stating the issues, charged the jury s:

he court instructs you that the burden of proof in this s upon the plaintiff, and in order to recover, she must ou of the truth of the material allegations of her com- a preponderance of the evidence. If she does not so ou, you must find for the defendant.

he court instructs you that negligence is the violation of gation which enjoins care and caution in what we do. It ng of something which an ordinarily careful and pru- would not do under the particular circumstances, or the

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leaving undone of something which an ordinarily careful and prudent man would do under those circumstances:

"4. The court instructs you that from the last instruction you will notice that only that care is required that an ordinarily careful and prudent man would use, but this care must be considered with reference to the object to which it is applied. In determining what amounts to negligence in any particular case, the thing to be cared for and the danger to which it is exposed are the principal considerations. In this case it is for you to determine whether the defendant, by its servants, used such care for the protection and safety of the plaintiff as an ordinarily careful and prudent man would have used under the circumstances. If it did not, and the plaintiff received injuries on account of the negligence of the defendant and not through any want of care on her part, the defendant is liable in damages.

"5. The court instructs you that it was the duty of the plaintiff to use ordinary care as hereinbefore defined, as to her own protection in alighting from defendant's car, and if she was guilty of negligence contributing to the injuries of which she complains, then she cannot recover. That is to say, if the defendant, by its servants, was guilty of negligence, and the plaintiff was also guilty of negligence contributing to her injuries, then the plaintiff cannot recover in this action.

"6. The court instructs you that it was the duty of the plaintiff, in seeking to alight from the cars of the defendant company, to wait until such cars came to a full stop, or were moving so slowly that, under all the circumstances, including the time of night, her sex and condition, it was safe for her to step off; and if she sought to alight from the car before such time, although unless she did so she might be carried by the point where she desired to get off she was negligent and cannot recover in this case.

"7. The court instructs you that, in determining the amount of damages to which the plaintiff is entitled, if any, you will take into consideration all the facts and circumstances in evidence before you—the nature and extent of the plaintiff's physical injuries, if any, whether such injuries are permanent or temporary, and also such prospective sufferings and loss of health, if any, as you may believe, from all the evidence before you, to be reasonably certain from the injuries she may have received, her capacity

prior to such injuries and the amount usually earned by anything, and her diminished capacity for labor, if any, by the injuries claimed to have been received; and if you the plaintiff, you will allow her such sum as shall be fair between the parties hereto, not exceeding the amount

The court instructs you that you are the sole judges of the weight of the witnesses and the weight to be given to their testimony. In passing upon these matters you may take into consideration the interest, if any, they may have in the result of the trial; their conduct upon the witness stand; their intelligence; their candor or want of candor; their want of intelligence; their candor or want of candor; their means of knowledge of the facts to which they have testified; and from what they may have shown in their evidence; and from the circumstances surrounding them you will give to the testimony of each of them such weight as you shall deem it justly to give."

For accommodations, medical treatment, etc., having been claimed for plaintiff by defendant, the jury were expressly instructed not to allow them in any event; hence, these items do not appear in instruction No. 7.

In addition to a general verdict in favor of plaintiff, the jury were asked to answer to certain interrogatories which defendant's counsel requested to have submitted to them, as follows:

Q. Did said cable car, in response to any stop signal given by the conductor to the gripman, stop anywhere between said Race and Vine streets, to let said plaintiff get off; if so, state where it stopped and the distance from either one of said Vine or Race streets?

A. Yes, about 133 feet east of Race Street.

Q. Was the said cable car moving at about its regular and usual rate of speed when plaintiff Owens stepped from said car to the ground and received her injuries?

A. No.

Q. Do you find the present health and physical condition of plaintiff is now, as the result of said injuries, different and less than what it was before the receipt of said injuries; if so, state what particulars?

A. Yes. General debility.

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"4. Do you find the plaintiff was permanently or temporarily disabled from and as the result of said injuries?

"A. Permanently.

"5. If you answer permanently disabled, state to what extent and in what respect plaintiff is permanently disabled.

"A. Disabled to the extent that she cannot earn her own living."

J. H. BROWN and MILTON SMITH, for appellant.

WELLS, MCNEIL & TAYLOR, for appellee.

Elliott, J.—At the trial of this case there was a sharp conflict of evidence going to the very substance of the issue and to the very gist of the action. Plaintiff testified positively that the car stopped for her to alight; some of defendant's witnesses testified with equal positiveness that the car did not stop, not even slacken its speed for that purpose.

1. If, as claimed by plaintiff, the car was stopped for her to alight, and she attempted to alight while it was so stopped, then it was negligence on the part of the defendant company to start the car again before she got safely off. On the other hand, if plaintiff stepped from the car while it was going at any such rate of speed as eleven miles per hour, such act was gross contributory negligence on her part.

2. It is urged with much force in this case that the evidence preponderates so strongly against plaintiff that a verdict in her favor cannot be sustained as a matter of law. It is conceded that the cause has been tried five times before a jury. The first time the verdict was in favor of plaintiff; at the second and third trials the jury disagreed; on the fourth trial the verdict was in favor of plaintiff, and the presiding judge, Hon. J. A. Bentley, set the verdict aside. His reasons therefor were offered on this trial in support of defendant's motion to take the case from the jury. Among other things, Judge Bentley said:

"I think the verdict ought to be set aside, for the simple reason that there is not sufficient satisfactory proof in the case to sustain that verdict.

"It is true that the plaintiff testifies that the car stopped when she attempted to alight, and started again while she was attempting to alight; but it is an unquestioned fact that she was, at the very moment of the accident, thrown into a condition of uncon-

, from which she awoke only periodically for quite a number of days; and it may well be considered that her statement should be rather carefully scrutinized as to its being correct as to exactly what occurred. But there are material facts in this case which I regard as overwhelmingly in support of her statement. Her injury was upon the back of the car. She was found lying upon her back, with her head in the position in which the car was moving, unconscious. Now, that points to the fact that she reached the car when the motion of her body was very strongly to the forward, towards the way the car was going. The conductor testified when he saw her getting off the car her back was turned in the direction in which the car was moving, and she was going down the railing on the steps. . . .

Though it is the fourth trial, and ordinarily the court would act with great reluctance, it does now act, and reaches this conclusion with the greatest reluctance; still I feel it is my duty to grant the verdict and grant a new trial."

The court is not disposed to question the wisdom of the court's granting the new trial. The evidence as it then appeared is before us, except such as is stated in the judge's opinion. It is true, though there had been four trials, two of them had been *retrials*. The presiding judge had listened to the evidence, and might with propriety conclude that he ought to take the case to another jury before rendering final judgment. If judges were to review their proceedings a little more rigidly, and grant new trials a little more readily in cases of serious doubt, there might be fewer appeals or fewer reversals in the appellate

position in which plaintiff's body was found lying immediately after the accident cannot be regarded as decisive of the question of negligence or contributory negligence. The car was moving eastward when plaintiff alighted, so say both parties; but whether at the rate of eleven miles per hour or just starting at all is the precise question of fact in dispute. In behalf of plaintiff it is contended that the car started while she was in the act of alighting, and so was in fact moving before her feet reached the ground; if she had succeeded in getting off while the car was at a standstill, there would have been no accident.

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The conductor testified that plaintiff's head was lying toward the east when he found her; on cross-examination he said her head was "a little more to the south than it was to the east." He was the only person testifying upon this point, for he had raised her body to a "sitting posture" when the other witnesses arrived. Accepting his statement as correct, what conclusion is to be drawn? The circumstances must be considered; it was a closed car; the exit was at the rear; plaintiff arose and walked out upon the rear platform; but it is not the theory of either party that she was jerked off the rear platform by the sudden starting of the car; there was a railing at the rear of the platform; and the conductor testified that he saw plaintiff going down the steps to the south side of the car, and that she "stepped off."

The car being in motion gave a certain momentum to plaintiff's body in the direction it was moving; by alighting upon the immovable earth, the momentum of her feet was suddenly arrested while the momentum of her body continued; thus, the tendency was to cause her to fall, toward the east, except as her voluntary motion toward the south in getting off, acting conjointly with the motion of the car toward the east, gave to her body a resultant force or momentum toward the southeast. This was the tendency, whatever the velocity of the car. It is conceded that such would have been the tendency if plaintiff had alighted when the car was moving at the rate of eleven miles per hour; but the tendency would not have been different, except in degree, if she alighted while it was moving at a slower rate—as just after starting. So long as she was supported by the car, its movement would give momentum to her body in the direction it was moving. It is not impossible that the car started, and thereby gave such momentum to her body while she stood poised upon the steps in the act of alighting, when it was too late for her to recoil, but before she had actually consummated the act of alighting by placing her feet upon the ground. Thus it appears that plaintiff's theory is not necessarily inconsistent with natural laws.

Again, plaintiff may not have fallen in the direction in which her body was found; it must be borne in mind that time enough elapsed after her fall and before she was found for her to have writhed about and to have changed position more or less.

In the foregoing discussion we must not be understood as

rials have been had, if I understand counsel correctly, of which a verdict was found for the plaintiff, the third juries disagreeing, and on the fourth and fifth verdict was found for the plaintiff. There is some significance with respect to the question of the passion or prejudice of the jury, because where there is a conflict of the verdicts to authorize the court to set a verdict aside he must find more than that there is a preponderance either the one or the other; he must find that there is such a preponderance which establishes the fact that the jury must have been influenced by passion or prejudice, or have utterly misconceived the application of the evidence. Now, when three juries have found the verdict for the plaintiff it would be rather a harsh comment upon their action to say that they had each been influenced by passion or prejudice, if the attorneys had not so presented their case after the first trial, that there would be any such thing as their getting misled upon a misapplication of the evidence; so it seems to me that it should be taken for granted that this is not a case where the court should set aside the verdict because of the insufficiency of the evidence.

Only serious question in my mind is as to the question of damages. I think the damages are large, but that they are so large as to warrant the court to interfere is very doubtful.

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ful. Courts go a good ways in upholding verdicts on the ground. . . .

"Here, in this case, is a woman, very little advanced beyond thirty years of age. The evidence shows, or at least tends to show, that she, by reason of this injury, is in poor health and has been in poor health ever since, and suffers pain and discomfort by reason of this poor health."

In some cases it is difficult for the court to determine whether it should or should not withdraw the question of negligence, or of contributory negligence, from the jury. This subject was much considered in *Lord v. Pueblo S. & R. Co.*, 12 Colo. 390; the doctrine there announced may be considered the settled law under our present practice; but there is difficulty, nevertheless, in the application of those rules to particular cases. Upon careful review and consideration of the evidence in this case, we are of opinion that the trial court would not have been warranted in directing a verdict in favor of defendant. The issue was one which either party was entitled to have tried by a jury. Code, § 173. Upon the evidence adduced, the decision of the jury must be accepted as final, whatever may be the private opinion of the judges, unless substantial error prejudicial to the defeated party intervened at the trial.

The opinion of Judge Bentley does not necessarily indicate that he would have ultimately directed a verdict in favor of defendant; he simply granted a new trial. A judge may properly grant a new trial where he is convinced that the jury have not fully comprehended or fairly considered the evidence, even though he would not be justified in directing a verdict. This view is clearly expressed in the opinion of Judge Rising.

In *Green v. Taney*, 7 Colo. 278, Mr. Justice Helm, delivering the opinion of the court, said: "This court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of awarding impartial justice to the contending parties." See, also, *Bartelott v. International Bank*, 119 Ill. 259.

3. Errors are assigned to the charge of the court. See statement and instruction prefixed to this opinion. It is objected that

instructions "were too general and abstract, and practiced questions of law, as well as of fact, to the jury." An objection is urged against instructions 2, 3 and 4, upon the ground of negligence and contributory negligence. It is not urged that these instructions are erroneous as abstract propositions of law. There would be much force in the objection if instructions 2, 3 and 4 stood alone; but the objection is obviated by instructions 5 and 6; the whole charge upon the same subject considered together; thus considered, the charge advised the jury concerning the evidence applicable to the issues clearly and concretely. *Union Gold M. Co. v. Rock Mt. Nat. Bk.*, 16 Colo. 136; *Finerty v. Fritz*, 6 Colo. 136; *Marsh v. Cramer*, 16 Colo. 169; *Moffatt v. Tenney*, 17 Colo. 199.

An objection that instruction No. 7 directed the jury to allow such damages as should be fair and just between the parties without reference to the evidence, is untenable. The instruction successfully directed the attention of the jury to the evidence, to the facts and circumstances in detail to be considered in determining the amount of the damages, in case the jury should find for plaintiff. It is not urged that the elements of damages were improperly specified; but the last clause of the instruction is complained of. Counsel cite the case of *Penn. R.R. v. Pottsville*, 37 Pa. St. 298, where the court said it was "wrong" to charge the jury as follows: "The question of damages is for you. Should you feel it necessary to examine that question, let fair and exact justice be your guide, and your own conscience will determine it."

Counsel also cite the case of *Hawkes v. K. C. S. Yards*, 103 Mo. 271, where it was held that a charge is erroneous which, "merely designating the proper elements of damages, merely tells the jury that, in event of a verdict for the plaintiff, they will find such sum as will compensate him for his injuries."

The analogy between the instructions cited and the instruction given in the present case, is clearly apparent. The instruction directs the jury to the amount of damages to be awarded in cases of injuries, see *Wall v. Livezey*, 6 Colo. 474, and cases there

cited. The giving of instruction No. 8 is assigned for error. It is urged that the jury are not the sole judges of the credibility of the witnesses.

of the witnesses nor of the weight to be given to their testimony. It may be conceded that the jury are not, under all circumstances, the *sole* judges of such matters—as, for example, when the court, under proper circumstances, directs a verdict upon the evidence. It follows that by the use of the word *sole*, the instruction was not theoretically correct as an abstract legal proposition applicable to all cases. But the word was neither erroneous nor misleading in its *practical effect, as used under the circumstances*. Though it is a better practice to omit the word, yet, if used, we can hardly conceive of a case that would justify a reversal on that ground alone. In a case proper to be submitted to a jury, they are necessarily the judges of the credibility of the witnesses and of the weight to be given to their testimony, subject to the instructions actually given by the court; in their retirement the jury can have no further counsel, unless further instructions be subsequently given; hence, of necessity they become the *sole* judges of the credibility of the witnesses and of the weight to be given to their testimony, subject to the instructions of the court which accompany them, and which they are presumed to duly consider as a whole. Therefore, for the time being and for the purpose of considering their verdict, the jury in this case were the sole judges, as stated in the instruction, and it was *solely* for that occasion and for that purpose that the instruction was given. To hold otherwise would be to invade the province of the jury and practically overthrow their authority in their appropriate sphere. See 2 Thompson on Trials, § 2418; also, *K. P. R'y Co. v. Twombly*, 3 Colo. 125; and *Whitten v. State*, 47 Ga. 300.

5. The court was requested to charge the jury, in substance, as follows: If you find from the evidence that the testimony of plaintiff Owens as to how the injury was received is contradicted by the testimony of Evans, Clark, and Mr. and Mrs. Cruse, or by any two of them, and that such witnesses were possessed of equal means of knowledge as to how the injury to plaintiff was occasioned, and that such witnesses have no special interest in the result of the controversy, and are of equal credibility with plaintiff, then plaintiff has failed to make out her case by a preponderance of the evidence, and your verdict must be for the defendant.

Was it error to refuse such request to charge? The request

tain witnesses; it does not name all; it does not name witnesses who gave testimony tending to impeach Mr. Cruse. The instruction was calculated to mislead rather than the jury; its tendency was to establish a sort of mathematical numerical criterion for determining the weight of testimony. It was contrary to the maxim, *ponderantur testes non numerantur*. See Starkie's Ev. 832; also, 2 Thomp. on Trials, 442. In *Green v. Taney*, *supra*, it was said: "The weight of evidence does not wholly consist in its volume, nor in the number of individuals sworn. That is a most beneficent evidence, which gives juries a large discretion in judging of the credibility of witnesses; which makes it peculiarly their duty to discriminate between those who testify before them, and to impose upon them the duty of sifting the evidence, accepting the true and rejecting the false."

Plaintiff was asked, on cross-examination, if she had not, at the time when she was injured, had words with one of the defendant's conductors about being carried by her stopping the car. She answered several questions of this character. She was asked if, on a previous trial of this case, on June 17, 1890, about that date, before Judge Allen, she had not testified that she had words between herself and one of the conductors on account of his trying to carry her to Vine street, on an occasion previous to her being injured, and if she did not, on that occasion, testify that she then told the conductor a piece of her mind, and told him that if he did not get off she would lick him. Plaintiff denied having given such testimony. On the defense, defendant called the official reporter who took the evidence at the June trial, 1890, and offered to show that plaintiff did give the testimony thus testified to. The rejection of his offer is assigned for error. Proposed violent words did not occur on this occasion of injury, nor were they connected with that transaction, nor had they been given in chief on this trial; they were not, therefore, part of the *res gestæ*. But were they admissible, as impeaching testimony, or for any other purpose? After proper foundation, a witness may be impeached by showing that he has made a statement material to the issue different from the testimony he has given; but he cannot be impeached by showing that he has made a contradictory statement concerning some col-

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lateral or immaterial matters ; and such was the nature of the testimony offered. 1 Greenl. Ev. § 449.

The evidence offered was not admissible to show the character or temper of plaintiff ; her character was not involved in the issue, except as it might be considered in relation to her veracity as a witness ; and her character for veracity was not open to attack in the manner proposed ; nor was the temper of the plaintiff material to the issue, except as it may have been exhibited at the time of the accident, and the testimony offered did not relate to that time.

7. The gripman, being sworn as a witness for defendant, was asked : " Was there any custom or usage in respect to the stopping of cars ? " He answered : " We had orders not to stop in the middle of the block. " Objection to this testimony was sustained, and the ruling is assigned for error.

Whether the custom or usage of a corporation may be given in evidence in its own behalf in case it is charged with some act causing injury and damage, and the defense is that the act was done in pursuance of a proper usage or custom well known to the party complaining, is a question not directly involved in this controversy. Plaintiff did not complain because the car was not stopped in the middle of the block. On the contrary, she asserted that the car was stopped in the middle of the block, and that being so stopped, it was negligence to start it again before she had got safely off. She does not complain of negligent stopping, or of failing to stop, but of negligent starting.

If it had been proposed to show that the gripman had been in the service of the company for considerable time, and that it had been his particular habit or custom not to stop in the middle of the block, this would have lent corroboration to his testimony that he did not so stop ; for in case of doubt as to what a person has done, it may be considered more probable that he has done what he has been in the habit of doing, than that he has acted otherwise. *Lawson's Usages and Customs*, § 46 ; *State v. Railroad*, 52 N. H. 549. But the offer of testimony did not extend that far ; nor was such view urged upon the trial court. The reasons stated at the trial for and against the admission of the testimony were as follows :

" Mr. Brown.—It is *only* in explanation of why he continued on to Vine Street after receiving the signal, that is all.

Taylor.—It is immaterial what caused him to do it; the question is whether he did it or not.

Court.—If the only thing that is material is whether he did it, I can't see that it is material why he did it.

Brown.—The custom and usage of the company are a part of the *res gestæ*."

The grounds thus presented for the admission of the evidence, the ruling of the court was right; but conceding that the defendant was competent to prove that the rules, orders, or usages of the company were not to stop in the middle of a block on the ground that they may be presumed, until the contrary is proved, that the defendant obeyed such orders, we find upon examination that such evidence was abundantly proved by the same witness without objection or remark from anyone, both before and after the ruling was sustained. Before the ruling the gripman had testified:

"I state all you know of the occurrence.

"As near as I can remember, we crossed Race Street, and entered the alley before I got the signal to stop; I got one bell, and orders not to stop in the middle of the block to disengage the passengers, and I went on to the next street, or nearly to Vine Street. And there was a colored person came to the door of the car, and said there was a lady fell off the car and got hurt, so then I stopped the car as soon as I could."

On re-examination after the ruling complained of, the witness testified:

"One tap of the bell, was all the signal I got.

"What was that signal?

"One tap of the bell means stop.

"Stop the car where?

"On the other side of the crossing, on Vine Street; I got it stopped between Race and Vine.

"What signal was understood by you to stop on the far side of the street which you were then approaching?

"Yes, sir."

"There was no evidence contrary to the foregoing concerning the rules or usages of the company in respect to stopping in the middle of a block; so that the full weight of such evidence was to be weighed by them in connection with the

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direct testimony as to whether the car did or did not actually stop at the middle of the block when and where plaintiff was injured.

[At this point the court discusses the question of professional communications, an attorney having testified in the case. This part of the opinion is omitted here.]

This appeal has been ably presented. Exhaustive arguments, oral and printed, have been presented, numerous authorities have been cited; we have endeavored to give the same careful consideration; and thus, this opinion has been much extended. Of the matters assigned for error and urged upon our consideration, we find nothing to justify this court in awarding another trial of this much-tried cause. The record as a whole shows that the cause was carefully tried; and the judgment of the District Court must accordingly be affirmed.

Affirmed.

On petition for rehearing.

Per Curiam.—Counsel urge the following among other grounds for a rehearing.

“The general instructions given in this case were not cured by the specific instruction hypothetically applied to the facts of Miss Owens’ attempt to alight from the car. Her testimony established two independent, distinct causes of action:

“1. The negligently carrying of Miss Owens past her destination, *i. e.*, the corner of Race and Colfax.

“2. The failure of the company to allow her sufficient time within which to safely alight from the car.

“Her testimony clearly and fully established *prima facie* both of these causes of action. Her testimony as to the first one, *i. e.*, carrying her past her destination, was not denied. . . . Of course, as a matter of law, the judgment . . . upon the first cause of action, namely, carrying her past her destination, would be clearly excessive and unwarranted. But who can say upon which theory, under the general instructions in this case, the jury proceeded in finding its verdict? So far as Miss Owens’ testimony is concerned, a verdict in her favor would be warranted upon either cause of action, and, therefore, it is submitted that the specific instruction as to what would constitute negligence by Miss Owens in alighting from the car did not correct the error of the general instructions given in this case.”

which thus clearly presented was not discussed in the former opinion though it was fully considered before that opinion was rendered.

The argument is forcibly put, but the record furnishes no complete answer to it.

Plaintiff did not by her suit claim any damages on the ground that she had been negligently carried past her destination. The allegation of negligence stated in her complaint was as follows:

"Defendant so negligently, carelessly and unskillfully managed and operated its said railway, and the cars aforesaid, that plaintiff when attempting to alight from the said car, and while exercising all due care in that behalf, was suddenly and violently thrown to the ground, and thereby was greatly bruised and wounded in and upon the head of plaintiff, and upon other parts of the body of plaintiff."

The first instruction given by the court to the jury specified the sole ground upon which plaintiff claimed a verdict.

It stated plaintiff's claim as follows: That the defendant company was a carrier of passengers for hire, and "received plaintiff on one of its cars, and for a certain hire and reward paid plaintiff to undertake her carriage along Fifteenth street and the Broadway avenue; that defendant so negligently, carelessly and unskillfully managed and operated its said railroad and cars that while attempting to alight from said car, and while exercising due care on her part, was suddenly and violently thrown to the ground, and thereby was greatly bruised and wounded in and upon her head and other parts of her body, and was made sick, and then suffered, and from thence hitherto hath suffered great pain in body and mind by reason of said injury." In connection with the other instructions, restricted plaintiff's recovery to the second ground above stated.

Nothing in the pleadings, or in the charge of the court, was intended to indicate that plaintiff had any other cause of action than that above stated; nor does it appear that any other ground of recovery was urged against the defendant company at the trial. The recovery was entirely unwarranted, therefore, for this court to sustain the supposition that the jury might have based their verdict upon some other cause of action.

The grounds upon which a rehearing is asked were sufficient.

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ciently discussed in the former opinion. This case, owing to its apparent hardship against the appellant company, has been presented by counsel with great zeal and ability; but upon careful consideration there appears no substantial ground to justify an appeal to the appellate court in disturbing the final judgment in the case. The petition for rehearing must, therefore, be denied.

Rehearing denied.

THE DENVER TRAMWAY COMPANY v. REID.

Court of Appeals, Colorado, October, 1893.

[Reported in 4 Colo. App. 53.]

INJURY FROM ELECTRIC SHOCK FROM CAR ESTABLISHES PRIMA FACIE CASE OF NEGLIGENCE.—In an action for injuries caused by an electric shock from contact with a street car while a passenger was alighting, evidence that the car was so charged with the fluid as to injure a person by contact with any part of it, if not establishing negligence *per se* makes such a *prima facie* as to require defense.

CROSS EXAMINATION.—It is proper to ask a witness who had testified that electricity could not be transmitted to a car in quantity sufficient to cause injury, whether the metal railings around the ends of the cars had not blisters caused by a leakage of electricity.

EXTRAORDINARY CARE REQUIRED OF CARRIER USING ELECTRICITY AS MOTIVE POWER.—A railway company operating its cars by electricity is bound to use extraordinary care and is liable for slight negligence.

APPEAL from the District Court of Arapahoe County.

Action brought by appellee to recover damages for personal injuries sustained by the alleged negligence of appellant in its management of its cars in his transportation from one part of the city to another. Following is the complaint:

"The plaintiff complains of the defendant, and for a cause of action against it alleges:

"That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Colorado.

"That the plaintiff was, at the time of the grievances hereinafter complained of, and has been during the most of his life since he arrived at maturity, a blacksmith by trade, and at the time of the grievances hereinafter complained of he was working at and carrying on his said business of a blacksmith in the city

er, and earning thereby a good living for himself and his and further, that he had no other means of earning a for himself and his said family except by his said trade.

the plaintiff further alleges that on, to wit, the 9th day mber, A. D. 1890, the defendant was, and for a long or thereto had been the owner of and operating a certain railway in the said city of Denver, county and State afore- the purpose of transporting passengers to and from dif- ortions of said city, and that said railway was and is by means of electricity conveyed along the route of l by means of overhead wires.

upon, to wit, the said 9th day of September, A. D. 1890, tiff was upon one of the trains of the defendant com- a passenger thereon, for the purpose of being carried and ed from one part of said city of Denver to another part y in consideration of the sum of five cents, then and d by the plaintiff to the defendant, in consideration of m the defendant undertook to carry and transport the from, to wit, at or near the corner of Twenty-fourth and t Streets, in said city, to, to wit, the corner of South reet and Tenth Avenue, in said city, and that while the was in the act of getting off and alighting from the cars fendant, and without any fault or negligence whatever art of the plaintiff, the said train of the defendant was so tly and carelessly operated and handled by the said t, and the said electricity by which said train was as so carelessly, negligently and unskillfully used, that ected and sudden jerk or motion was communicated to train, whereby the plaintiff was violently and with great own down upon the track upon which said cars were and between the cars of said train, and through the neg- nduct of the said defendant, and by reason of the negli- eless and unskillful manner in which said train and said y was used and operated the plaintiff received on, upon his body large quantities of said electricity, and that, by f said electricity his whole system was greatly burned, and injured, so that by means of the fall occasioned by en motion of said train as aforesaid, and by means of the shock received from the electricity aforesaid, and the

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burns aforesaid, the plaintiff was greatly and severely hurt, bruised and injured in and throughout his limbs, his body and his whole system, and that his limbs and body have been and still are, to a considerable extent, paralyzed and rendered unfit for their ordinary functions and uses, and that he was otherwise severely hurt, bruised and injured generally throughout his whole body and limbs by being so thrown down as aforesaid, and by means of said electricity aforesaid, and that said hurts, burns, bruises and injuries aforesaid, so caused by the negligence of the defendant as aforesaid, are of a permanent and lifelong character, and have to the present time, and at all times hereafter, will prevent the plaintiff from doing or performing manual labor; that he has suffered great pain and anguish on account of the hurts and injuries so received as aforesaid, and still suffers. And so the plaintiff alleges that he has been damaged, by reason of the premises, in the sum of \$20,000.

"And the plaintiff further alleges that, on account of the hurts, burns, bruises and injuries aforesaid, he was compelled to employ physicians and nurses to render him assistance and to take the necessary and proper care of him; that the charges made by said nurses and physicians amount to the sum of \$1,000; that said charges are reasonable and proper, and all of which the plaintiff is obliged to pay on account of the said negligent conduct of the said defendant.

"Wherefore, the plaintiff demands judgment for the sum of \$21,000 and costs of suit."

Appellant answered, denying the allegations of the complaint, and for a second or further answer, alleged:

"That neither it nor its agents, servants or employees was guilty of the carelessness, negligence and improper conduct in the complaint alleged, and says that the injury therein described, if any there was, was caused by the fault and negligence of the plaintiff himself."

Replication of plaintiff traversing answer.

The issues so made were tried to a jury, to which, among many others, the following instructions were given, contended by appellant to have been erroneous:

"1. The court instructs the jury that the defendant company is a carrier of passengers, operating its cars by means of electricity,

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And further, the jury are instructed that, if the injury complained of was done to the plaintiff by the electricity used by the

defendant for motive power, or in any other wise, or by any other means, or on account of the failure of the defendant to use extraordinary care about the operation of its said road and car, then the defendant company is liable in this suit, unless the plaintiff had failed to use ordinary care and prudence in preparing to leave said car and alighting therefrom, and, even if he failed to use such ordinary care and prudence, the defendant company is still liable if this failure to use ordinary care and prudence on the part of the plaintiff was the remote, and the negligence of the defendant company was the immediate cause of said injury.

"2. The presumption is that the plaintiff used ordinary care and prudence at the time of the alleged injury, and it is incumbent upon the defendant to prove that the plaintiff did not use such ordinary care and prudence, and to prove that the want of such ordinary care and prudence on the part of the plaintiff was the immediate and not the remote cause of the injury complained of.

"5. The court instructs the jury that intoxication on the part of the plaintiff, if the jury believe the plaintiff was intoxicated, is not, as a general rule in itself, as a matter of law, such negligence or evidence of such negligence as will bar his recovery in this action. The law refuses to impute negligence as of course to the plaintiff from the bare fact that the moment of suffering the injury he was intoxicated. Intoxication is one thing and negligence is another sufficient to bar an accident for damages quite another thing. Intoxicated persons are not removed from all protection of law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, as explained to you in a previous instruction, then his intoxication, if you believe from the evidence he was intoxicated, had nothing to do with the accident. When contributory negligence is one of the issues, as in this case, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care—not whether or not the plaintiff was drunk."

It is claimed that the last is in conflict with the 10th, which is

"10. The court instructs the jury that plaintiff alleges that he was injured, without any fault or negligence whatever, while alighting from defendant's cars. The court instructs you that

you must be satisfied from the evidence offered in the case that such was the fact, and if you find from the evidence that just before and while plaintiff was attempting to alight from defendant's train he was under the influence of liquor to such an extent as to prevent him from exercising reasonable care and caution in controlling the movements of his body, although he might not have been entirely under its influence, and that such inability of plaintiff to so control his actions caused or tended to cause his receiving the injuries he claims in attempting to alight from defendant's train, then the plaintiff was not without fault, and your verdict must be for the defendant."

Other supposed errors in receiving and rejecting evidence are discussed in the opinion.

The jury found for the appellee with damages of \$5,500.

JAMES H. BROWN and MILTON SMITH, for appellant.

MARKHAM & CARR, for appellee.

Reed, J.—The fact that serious injuries were received by appellee, the nature, extent and consequent effect of such injuries and the manner in which they were received, were well established by the testimony, and appear to have been practically conceded by appellant, no serious effort having been made to in any manner contradict them.

The question of negligence on the part of the appellant corporation and contributory negligence upon the part of the plaintiff were the only important issues involved. Those having been found by the jury in favor of the plaintiff, unless serious legal error occurred upon the trial, either in the admission or rejection of evidence, or in the instructions to the jury as to the law of the case, such verdict cannot be disturbed.

The questions of negligence upon the part of the defendant and contributory negligence of plaintiff are purely questions of fact, to be determined by the jury, not of law. No principle is better settled, both in the United States and England.

In *Beach on Con. Neg.* § 163, it is said: "In general it cannot be doubted that the question of negligence is a question of fact, not of law. Whenever there is any doubt as to the facts, it is the province of the jury to determine the question; or, whenever there may reasonably be a difference of opinion as to the inferences and conclusions from the facts, it is likewise a question

for the jury. It belongs to the jury, not only to weigh the evidence and to find upon the question of fact, but to draw conclusions as well, alike from disputed and undisputed facts." And a note the text is supported by almost innumerable authorities from every State in the Union.

In *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich., Judge Cooley said, at page 118: "Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury. The injury is therefore, one which must take into consideration all these circumstances, and it must measure the prudence of the party's conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person under the given set of circumstances, the prudence of the party injured must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus, the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and can only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

Although in all cases, both civil and criminal, the rule of law is well settled that it is the province of the jury to determine facts, it seems to be regarded as peculiarly within their province in cases of alleged negligence, and contributory negligence, where, as in this case, the negligence of one, or combined negligence of both, resulted in serious injury. And the reason undoubtedly is as stated by Judge Cooley, "that the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons."

In England, in *Met. R'y Co. v. Jackson*, L. R. 3 App. Cas.

was said: "Whether there is reasonable evidence to be the jury of negligence occasioning the injury complained of is a question for the judge. It is for the jury to say whether the evidence is to be believed."

Lincoln, etc. R'y Co. v. Slattery, L. R. 3 App. Cas. 1155 (2), where there is conflicting evidence on a question of fact, whatever be the opinion of the judge who tries the cause as to the weight of that evidence, he must leave the consideration of it for the consideration of the jury."

Brown v. Gt. West. R'y Co., 52 L. T. 622, 652 (3), the court held in an action of negligence, if the plaintiff gives evidence

Metropolitan R'y Co. v. The Great Western R'y Co., L. R. 3 App. Cas. 193 (Lords, Dec. 1873), it appeared that the plaintiff was a passenger in a carriage on defendant's railway. At the station three persons went by the way into the car and were not seen by the plaintiff, but there is nothing to show that a complaint was made by the plaintiff's servants, or that they were tried to force their way into the car. Plaintiff rose to keep his seat when the train started, and, when he fell, put himself from falling, put his hand on the edge of the door. A railway porter came up to the door, and in doing so struck the plaintiff's thumb. *Held*, that the facts did not establish such negligence on defendant's part as would have occasioned the injury, and the judge ought so to direct the jury.

Lincoln, Wicklow & Wexford R'y Co. v. Slattery, L. R. 3 App. C. 1 (House of Lords, July, 1878), where the plaintiff's intestate, who was at the station, wished to purchase a ticket. To do this it was necessary to cross the line, which he

did in front of a train slowly approaching the station. It was nighttime, and there were notices posted, warning persons not to cross at that point, but there was evidence to show that the railway servants never interrupted persons who did cross there. Deceased crossed in safety, and having secured his ticket, attempted to re-cross behind the train, which by this time was at a standstill. Owing to the fact that the train was there, the deceased could not see the other track, and as he stepped from behind the stationary train, he was struck by a moving train and killed. The rule of the railway demanded that the whistle be sounded upon approaching a station, and the servants of defendant claim this was done. The friends of deceased at the station denied this, and state that if the whistle had sounded they would have heard it. *Held*, that this was a case which was properly left to the jury, for that where there was contradictory evidence on facts, the jurors, and not the judges, must decide upon them.

3. *Brown v. Great Western R'y Co.*, 52 L. T. 622 (Court of Queen's Bench, March, 1885), shows that

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of negligence on the part of the defendant, and also gives evidence which may or may not be considered as amounting to contributory negligence on his own part, the case ought to be left to the jury." And see, *Davy v. London, etc. R'y Co.*, L. R. 12 Q. B. 70 (1); *Martin v. Northern, etc. R'y Co.*, 16 Com. B. 179.

One important branch or factor in the case seems to be ignored or overlooked, or at least not treated in argument with the co-

plaintiff, an intending passenger by defendant's railway, having received his ticket, was obliged to cross the line by a level crossing in order to get from the booking-office to the platform from which his train would start. Whilst crossing, he was knocked down and injured by a passing train, which he was unable to see until it was about twenty yards from him, owing to a sharp curve on the line. The night was dark and there was no one at the crossing to warn the plaintiff of the approaching train, which was a special train running through the station at a fast speed, and not mentioned in the time-table. At the trial the judge directed a nonsuit. *Held*, that the nonsuit was error. Manisty, J.—"Whenever there is a question of whether there is any evidence of negligence or of contributory negligence, unless there is a total absence of evidence of negligence and of contributory negligence, it must go to the jury . . . in order that they may form their own opinion upon the facts of the case."

1. In *Davey v. London & South Western R'y Co.*, L. R. 12 Q. B. 70 (Court of Queen's Bench, November, 1883), the facts showed that plaintiff, a foot-passenger, was injured while crossing defendant's line. It was impossible to see the up side of the track until within a foot or two, but

once on the down side there was a clear view of the up side for several hundred yards. Plaintiff was crossing from the down side when he was struck by a train on the up side. Plaintiff admitted that he did not look along the up line, and it appeared that no whistle was blown. A servant employed by defendant at the crossing did not warn the plaintiff that a train was approaching. The plaintiff was nonsuited. *Held*, the nonsuit was right, as although there was evidence on the part of the defendants, according to the undisputed facts of the case the plaintiff had shown that the accident was solely caused by his omission to use the care which a reasonable man would have used. (Affirming L. R. 11 Q. B. 213.)

2. *Martin v. Great Northern R'y Co.*, 81 C. L. 16 C. B. 179 (Court of Common Pleas, Easter Term, 1855) was an action for damages for injury arising from defendant's negligence. The evidence showed that the plaintiff arrived at the station about ten minutes or less before the time of departure of the train, and that, while running along the line, at a place where he ought not to have gone, in order to reach the train which was some distance ahead on the opposite side of the railway, he fell over a switch handle, and was considerably hurt. The judge left it to the jury

its importance required, viz., the serious injury from caused by coming in contact with the lower part of the railing. The negligence in operating the cars, whereby plaintiff was thrown in such position as to come in contact with the electric charge, may undoubtedly be regarded as the cause of the injuries. The negligent application and the electric current by which the metallic portions of the car became charged, was the cause of the damage to the person and burning. The first, proximate and direct, the other both united caused the damage to the person, consequently both must be regarded. The car was a "trail," supposed to be free from the influence of the motive power which was applied to the motor car. It was alleged in the complaint that because of the negligent, careless and unskillful manner in which said train and said electricity were used and operated, the plaintiff received on, upon and into his body large quantities of electric current, and that, by *means of said electricity*, his whole body was greatly burned, shocked and injured, so that by means of the sudden motion of said train . . . and *of the powerful shock received from electricity*," etc. It being established that injuries were caused by electricity, that the car was so charged with the fluid as to injure a person in contact with any part of it, if not establishing negligence, made such a *prima facie* case as to require defense, to show that the injuries were not caused by that agency or by the careless use of the agent. No effort was made upon the trial to show that the injuries were not caused by electricity, as alleged in the complaint and established by the evidence, nor was the cause of the fluid explained or attempted. It is true Mr. [Name] was an electrical engineer, in the employment of the company, and testified, the result of his evidence being that he

the injury to the plaintiff was occasioned by the negligence of the proper care of defendants, and entirely from the plaintiff's negligence, as the company alleged. The jury found for the plaintiff, that the judge was, under the circumstances, warranted in

leaving the case to the jury upon the only points raised by the parties, and that the omission to call their attention to the intermediate case of the negligence of both parties being contributory to the accident, was no misdirection.

knew nothing whatever about it, nor even what car it was; that it was his duty to cause every car to be examined at the station, that he had given such orders and presumed the examination had been made in the station the night after the accident happened, etc.; all of which was not of the least importance, the question being what the electrical condition was at the time of the injury; that certainly could not be determined by the examination hours afterward of the car detached from the motor and "housed." Mr. Ballow and a Mr. Dashiell testified, as expert electricians, that the cars were so coupled, constructed and insulated, that it, in their opinion, would be impossible for the trail car to become so charged with electricity as to cause injury to a person coming in contact with any part of it. However expert, scientific and learned they may have been upon the subject, and however honest, what they or either of them thought in regard to it was of very little importance when confronted with the facts and results established and uncontradicted.

In *Flannery v. Waterford, etc. R'y Co.*, 11 Irish Rep. C. L. 30 (1), it was said: "When a plaintiff sustained injuries in consequence of a portion of the train in which she was traveling having left the rails, and the railway, the engine and the carriages were under the management of the company: Held, that the fact of the accident was sufficient evidence to cast upon the company the burden of showing that there was no negligence on their part; and that, as they declined to afford any explanation of the cause of the accident, there was a case for the plaintiff proper to be submitted to the jury."

Taking up the supposed errors in admitting testimony, Dr. Hart was asked, "From *your* knowledge of this case, what would you say as to the probability of his ever recovering his physical power?" Counsel says, "This question was objected to as not

1. The facts in *Flannery v. Waterford, etc. R'y Co.*, 11 Irish Rep. Com. Law, 30 (Court of Exchequer, January, 1877), were as follows: The plaintiff was injured while a passenger on defendant's train, by reason of the car leaving the rails. This was proven, as well as the fact that the engine and carriages were under the management

of defendant. *Held*, that these facts were sufficient to cast upon defendant the burden of showing that there was no negligence on its part; and if they declined to afford any explanation of the cause of the accident, there was a case for the plaintiff proper to be submitted to the jury.

being a proper hypothetical question, that it was not based on the facts proven or assumed to be proven." This was evidently the result of a misconception. Dr. Hart was plaintiff's family physician, had had plaintiff in his care from the time of the injury—still had him in his care. He was not called as an expert to testify upon a hypothetical case presented, but as to facts within his own knowledge, and he was asked not to testify from facts stated by others, but what he knew. He was asked, "From your knowledge of this case," etc. Even if an expert, the objection is answered by the first authority cited by counsel in support of his contention. Rogers on Exp. Tes. § 46.

"His opinion to be admissible must be founded either upon his own personal knowledge of the facts, upon facts testified to in court, or else upon a hypothetical question."

Mr. Ballow, an electrical engineer, employed by the company, attempted by his evidence in chief to establish the fact that electricity could not be transmitted to a trail car in quantity sufficient to cause injury. On cross-examination he was asked, "I will ask you as a matter of fact, if all the cars running on the Lawrence Street Line, belonging to the Denver Tramway Company, haven't blisters upon the metal railing around the ends of the cars, caused by a leakage of electricity? Are there not blisters on these the size of my thumb nail, on the metal, caused by this escape of electricity on the rear car?"

The questions were objected to as irrelevant and immaterial, because not limited to the particular car and about the time of the accident. Counsel seems to have overlooked the fact that witness knew nothing about the accident until the next day, and did not know the car upon which it happened, but had upon direct examination testified generally that in the cars as constructed and operated no appreciable amount of electricity could be transmitted to the "trail" car. Such being the fact, the questions asked appear to have been in the line of legitimate cross-examination.

An instructive case upon evidence in this class of cases is *Simpson v. London Gen. Om. Co.*, L. R. 8 C. P. 390 (1):

1. In *Simpson v. London General Omnibus Co.*, L. R. 8 C. P. 390 (Court of Common Pleas, Easter Term, 1873), a passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence on

"A passenger in an omnibus was injured by a blow from the hoof of one of the horses which had kicked through the floor panel of the vehicle. There was no evidence on the part of the passenger that the horse was a kicker; but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of kicking strap or otherwise, against the possible consequences of a horse striking out, and no explanation was offered on the part of the owner of the omnibus. Held, that there was evidence of negligence proper to be submitted to the jury. If evidence of other hoof marks upon the panel was admissible upon direct examination, and sufficient to convict the horse of being a "kicker," it seems that the questions on cross-examination, under the facts and circumstances of this case, were essentially proper.

Defendant offered to prove by Holland, a passenger, that other passengers getting on and off the car at about the same time were injured by electricity. Refusal of the court to admit the evidence is assigned for error and urged in argument. The refusal was proper; the fact sought to be proved could have no bearing upon the questions at issue. In order to be admissible under any circumstances, it would have to have been shown that some other person was in exactly the same position in regard to the car and earth as the plaintiff, immediately before or at the exact time of the injury. Probably no other person was so situated as to receive the charge by personal contact or otherwise. One person, by contact, might receive the entire charge from the dynamo or battery, while twenty others in the same room experienced no sensation whatever. If a person were known to be killed by lightning, bore unmistakable marks of the current, he would hardly be competent to attempt to rebut the fact by proving that no other person, or all persons, in the same vicinity, were not killed.

An attempt was made by the defendant to show that plaintiff

the part of the plaintiff that the horse was a kicker, but it was proved that the panel bore marks of other kicks, and that no precaution had been taken by the use of a kicking strap, or otherwise, against the possible con-

sequences of a horse striking out, and no explanation was offered on the part of the defendants. Held, that there was evidence of negligence proper to be submitted to the jury.

icated at the time of receiving the injury, and that such contributed. On cross-examination of plaintiff the following occurred:

Q. Do you ever indulge in intoxicating liquor? A. Sometimes some.

Q. How long have you had that habit prior to the receipt of injury? A. I don't know. I have always been in the habit. I was a teetotaler. I never was intoxicated but once in my

Q. You have been in the habit of drinking intoxicants before the receipt of this injury? A. Yes, sir.

Q. About how frequently did you indulge? A. Well, maybe once a day; maybe sometimes not for a month or two, and sometimes not for twelve months.

Q. What do you usually drink? A. Sometimes a little beer and sometimes a little whiskey.

Q. Have you ever been under the influence of intoxicants? A. Since I have been out in this country, that I know of.

Q. You still keep up the habit of indulging once in a while, drinking in beer and whiskey? A. Yes, sir.

Q. Do you remember whether you had been indulging in beer or whiskey on the day of this accident? A. No,

Q. Are you quite positive that you hadn't been indulging in beer or whiskey? A. No, I don't think it. I might have taken one."

Plaintiff attempted to prove by witnesses Walker, Seiffler and others that the plaintiff was intoxicated. In rebuttal plaintiff called his wife, daughter and a Mr. Cooper to show it was not true. By them his general character for sobriety was shown. Plaintiff aimed to have been error.

Plaintiff says: "There was no evidence offered by defendant as to my condition at any other time, nor did the defendant in any way attack the character or reputation of plaintiff Reid for years. All of the evidence on this question was directed solely to the condition immediately before, at and immediately after the accident. If this, as contended for, is the proper rule, defendant complains of its violation, having at the very outset disreputable in the examination of the plaintiff by inquiry regarding his condition for years. Such being the fact, the jury were entitled

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to all the facts, not only as to his condition at the time of injury, but as to his general character for sobriety. It would be competent for a person charged with drunkenness to show that he never drank, for a person charged with being drunk at a particular time that he had not taken liquor. Mr. Walker, considered by the jury as the defendant, testified to the intoxication and contributory negligence of plaintiff. Mr. Ustick was called by the plaintiff and examined in regard to a burglary committed near Walker's place of business, and was asked: "Now I will ask you to state whether he (Walker) was arrested? Also state whether he (Walker) was arrested for the offense?" To which the witness answered: "Mr. Walker was taken into custody at a certain time and taken to the city hall, and was released then at the city hall." Although perhaps technically erroneous, it carried with it its own antidote. Errors that are not shown to have been prejudicial are disregarded. The answer in regard to the arrest shows the dismissal of the charge and release, exonerating the witness. It can hardly be presumed that this attempted attack upon the character of the witness could have prejudiced the defendant, more particularly as the defendant afterwards recalled with Mr. Walker and he was allowed to establish his own innocence of the charge.

In argument the 1st and 2d instructions are considered together. It is objected, 1st, "that they are general instead of being specific. They do not advise the jury what facts, if found by the jury to be shown by the evidence, will constitute the contributory negligence, proximate and remote cause and contributory negligence, which are referred to therein. In short, they refer to the jury both matters of law as well as matters of fact." Again: "They stated mere abstract propositions of law. They were not put hypothetically, as they should have been."

We do not think them amenable to such criticism. Instead of being general and abstract propositions of law unapplied, they seem to be a full and complete statement of the law of negligence as applicable to the case, and specifically applied in every paragraph to the issues and the facts to be found by the jury. Had they could have been more definitely or specifically applied is not shown, nor can we discover. Specific objection is made to the following language of the 1st instruction: "The court instructs

that the defendant company is a carrier of passengers by its cars by means of electricity *and is bound to use ordinary care*, and is liable for slight negligence." It is contended that it is not the law. The authorities cited in support of this contention do not sustain it. The most that can be deduced from them is that the rule does not apply where the injury may have been caused by the act of a stranger, nor where the injury results from some voluntary act of the passenger himself, combined with some alleged deficiency in the carrier's means of transportation or accommodation. The first, "the act of a stranger," is certainly not involved; and whether the acts of the plaintiff concurring with the negligence of the defendant combined to cause the injury, was the very question the jury were called upon to determine, and what negligence on the part of the plaintiff would relieve the defendant from the rigor of the rule was not definitely stated.

Applying the rule as intended and applied by the court to cars propelled by electricity and the management and use of the motive power by which it was shown the injury was produced, it is not correct. The agent employed, common experience tells us, is one dangerous to life, even when the utmost skill and experience of best trained electricians are exercised. It is an unponderable, death-dealing element or fluid; of its nature and laws governing it very little is known, even among those who have advanced in the study of it. It may be harnessed, as a motive power and made to perform much economic work in mechanics, but as to its nature and vagaries nothing is known. It is full of surprises, and deals injury and death under circumstances deemed the most prudent management, and under what appeared to be the circumstances least liable to inflict injury. The use of such an agent extraordinary care in its management is required. Every appliance and precaution, as well as the best skill and men, should be applied in its use. How little is known of its eccentricities and possibilities, by even those most skilled and familiar with it, was shown upon the trial of this case, where the car was charged with it and the plaintiff received the injury and his wounds were the undisputed and indisputable result of the agency by which they were caused; instead of denying or showing the conditions to have resulted through no

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negligence of those in charge, two experts were put upon the stand who testified to the impossibility of the rear car being charged. Aside from the deadly agent used as motive power, the charge of the court, that the defendant was bound to use extraordinary care and would be liable for slight negligence, is warranted by the authorities. "The law requires a degree of care proportionate to the nature and risks in the given case." *Johnson v. H. R.R. Co.*, 20 N. Y. 65.

"Passenger carriers bind themselves to carry safely those whom they take into their coaches, *to the utmost care and diligence of very cautious persons.*" *Maverick v. Eighth Av. etc. Co.*, 36 N. Y. 378.

"A carrier of passengers by railway is required to show, that an injury to a passenger resulted from inevitable accident, or from something against which no human prudence or foresight could provide." *Sullivan v. R.R. Co.*, 30 Pa. St. 234; *Meier v. R.R. Co.*, 64 Pa. St. 225; *R.R. Co. v. Napheys*, 90 Pa. St. 135; *Warren v. Fitchburg R.R.*, 8 Allen, 233; *Phila. v. Derby*, 14 How. (U. S.) 486; *New World v. King*, 16 How. (U. S.) 469; and see *Scott v. London Dock Co.*, 3 Hurl. & C. (Exch.) 596. (1)

In *Smith v. St. Paul R. Co.*, 32 Minn. 1, it is said: "The severe rule which enjoins upon the carrier such extraordinary care and diligence is intended, for reason of public policy, to secure the safe carriage of passengers in so far as human skill and foresight can effect such result. From the application of this strict rule to carriers, it naturally follows that, where an injury occurs to a passenger through a defect in the construction or working or management of the vehicle or anything pertaining to the service which the carrier ought to control, a presumption of

1. In *Scott v. London & St. Catherine Dock Co.*, 3 H. & C. 596 (Court of Exchequer Chamber, Hilary Vacation, 1865), it appeared that plaintiff was a customs officer who was injured while upon defendant's docks. While passing before a warehouse he was knocked down and hurt by some bags of sugar that fell upon him from a point where they were being handled by defendant's servants.

The court, on trial, directed a verdict for the defendant, on the ground that the evidence was insufficient to establish negligence. *Held*, the court below erred in directing such a verdict. The accident was one that would not ordinarily happen if the defendant had used due care, and the facts, therefore, in the absence of any explanation, would constitute sufficient evidence of negligence to go to the jury.

...ce arises." In 50 Am. Rep. 550, the case is supported
 ...al pages of notes and almost numberless authorities.
 ...next contended that the court erred in charging the jury
 ...n arriving at a conclusion as to whether the plaintiff was
 ...f contributory negligence at the time of the happening of
 ...ent, they may take into consideration the natural instinct
 ...preservation, that any person under ordinary conditions
 ...e care of himself from regard for his own life." This
 ...be fully warranted by the authorities.
 ...riving at a conclusion as to whether the plaintiff has been
 ...f contributory negligence, the natural instinct of self-pres-
 ...and the known disposition of men to save themselves
 ...rm and injury, raises the presumption that the plaintiff is
 ...y of negligence." Moak's Underhill on Torts, 312, where
 ...number of authorities are cited in support of the text.
 ...o. on Neg. 1179; Railroad Co. v. Gies, 31 Md. 357;
 ...etc. R. Co. v. Slattery, *supra*. (1)
 ...stated that the court gave all the instructions asked by
 ...ties: 1 to 5 (both inclusive) asked by the plaintiff, 6 to
 ...inclusive) on the part of the defendant. It would be
 ...under the circumstances if they did not conflict more or
 ...it is contended that the 5th instruction given is erroneous
 ...licts with the 10th, given at the prayer of the defendant.
 ...says, "This instruction commences by advising the jury
 ...oxication in itself, as a matter of law, is not such negli-
 ...will bar his recovery in this action," and ends by advis-
 ...jury that "It must appear that the plaintiff did not exer-
 ...inary care, and that, too, without reference to his ine-
 ...The question is whether or not the plaintiff's conduct
 ...to the standard of ordinary care—not whether or not
 ...ntiff was drunk." It requires considerable ingenuity to
 ...t with the language cited. It, in effect, properly states
 ...to be, that the questions being tried were the negligence
 ...efendant and the contributory negligence of the plaintiff;
 ...ther the plaintiff was at the time intoxicated. That drunk-
 ...on the part of plaintiff would not relieve the defendant
 ...bility, if guilty of negligence, and that, drunk or sober, if

the plaintiff, by want of ordinary care, contributed to the injury. He must assume such responsibility, regardless of his condition. We cannot well see how it could have been different. If drunk he was held responsible for his negligence; and if drunk it can hardly be contended that it gave the defendant, for that reason, the right to kill or maim him, but, if known, imposed great care on the defendant. But the evidence failed to establish drunkenness, and the jury were warranted in disregarding it. The court would have been warranted in entirely withdrawing the question from the jury.

Owing to the importance of the case, the questions involved and the great industry and ability with which it has been presented, we have examined carefully each point urged and the authorities cited in support, and find no serious error. In fact it appears that the defense was allowed unusual latitude, and if any criticism of the instructions were to be indulged in, it would be that those given for the defendant were fully as favorable as warranted, and when in conflict with those given for the plaintiff were more so. It follows that the judgment must be affirmed.

Affirmed.

FULLER v. THE NAUGATUCK RAILROAD CO. (1)

Supreme Court of Errors, Connecticut, June, 1852.

[Reported in 21 Conn. 557.]

INJURY WHILE ALIGHTING FROM TRAIN—EVIDENCE AS TO TIME OF STOPPING.—In an action for injuries occasioned by starting a train while a passenger was alighting at a station, it was claimed that the train did not stop the usual length of time, and evidence of the usual and customary period of the train stopping at that place, to support the claim, it was *held*, was properly admitted.

CARRIERS NOT INSURERS—DEGREE OF CARE REQUIRED IN CARRYING PASSENGERS.—Carriers are not insurers of the safety of passengers, but they are bound to observe the highest degree of care in carrying passengers which a reasonable man would use. Their contract is that they will carry safely, and as far as competent skill and human foresight will go they will take due care in the performance of their duty.

ACTION on the case for a personal injury to Betsey Fuller, one of the plaintiffs.

1. Cited in *Union Hardware Co. v. Plume, etc. Co.*, 58 Conn. 219, 222; *Tompkins v. West*, 56 Conn. 478, 486.

endants were described in the writ as a "body politic
rate, created by the Legislature of this State, located
business in Bridgeport, in this State, by the name of
atuck Railroad Company, with power to sue and be
d and be impleaded."

ants pleaded the general issue, on which the cause was
itchfield, February Term, 1852.

he trial of this cause to the jury, the plaintiffs, in sup-
ne contract set forth in their declaration, offered one
Munger as a witness, to testify, that on the day when
complained of occurred, Betsey Fuller, one of the plain-
him some money, and requested him to purchase for
e defendants' agents in Waterbury, a ticket for her pas-
e defendants' railroad car from Waterbury to Plymouth;
ceived the money, purchased the ticket, and delivered it
d that she thereupon took her seat in the car for the
f being conveyed to Plymouth. To the admission of
ce the defendants objected, because, as they claimed, it
nduce to prove the contract set up in either count in the
n, but one variant therefrom. But the court overruled
n and received the evidence.

s, in further support of their action, introduced evidence
that upon the arrival of the car at the station for landing
s at Plymouth, the defendants gave notice to the pas-
ho were to leave at that place, by their agent's calling
mouth;" that, thereupon, she immediately left her seat
ed as fast as she could to get off the car, but before she
o leave the same she was thrown, by the rapid motion of
oon the ground, and severely bruised and injured; that
lants' train was either not stopped at all at said station,
ed, it was but for a very short time, and then again put
without allowing her any reasonable or sufficient time
leave the car.

proved, and admitted by defendants that upon the
the train at the Plymouth station, notice was given to
gers to leave, by the defendants' agent; that before the
y had left the car the defendants' conductor had given
for the train to proceed, and the same was in actual
nd that the injury complained of was occasioned thereby.

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But there was no evidence that said conductor, when he gave said order, had any knowledge that said Betsey had not left the car.

Defendants introduced evidence to prove, that their train stopped at said station, and remained stationary for a suitable and proper period of time, and sufficiently long to enable her to leave the car safely and conveniently, after due notice had been given to her, but that instead of leaving the car in a reasonable time she remained therein an unreasonable period of time, and unduly after the train had resumed its progress, and that known to her, that when she was about getting off the car, she was informed by the superintendent of the road that the train was moving, and that it would be dangerous for her then to leave, and if she would remain he would stop the train. But it was denied by the plaintiffs that any such information was communicated to her.

The plaintiffs offered evidence to prove what was the usual and customary period of time allowed by the defendants for passengers to leave at that station. To the admission of which the defendants objected, but the court admitted it.

The defendants requested the court to charge the jury as follows, to wit: 1. "That if they found that the train was stopped for the usual time of stopping at the station, or long enough to enable Mrs. Fuller, by the use of reasonable expedition and care, to get off the car with safety, and she did not improve that opportunity and get off, the defendants were not responsible for the injury." 2. "That if the jury found that the train was stopped, after notice to the passengers to leave, the usual time, or long enough to enable Mrs. Fuller, in the use of reasonable expedition and care, to get off safely, and she did not get off then, the defendants are not liable for any injury occurring afterwards, provided the jury believe that the conductor, at the time he started the train, bona fide supposed that the passengers who desired to leave had left the cars." 3. "That if the jury found that at the time Mrs. Fuller left the car the train was in motion, so as to render it unsafe for her to leave it, and she knew it, or by the use of reasonable and ordinary care might have known it, and yet went on, the defendants are not liable, whether the train was stopped or not at that station." 4. "That the degree of care which the defendants, as common carriers of passengers, were bound to exercise in affording to Mrs. Fuller an opportunity to get off with

not the highest degree of care attainable by human foresight, but only that reasonable care which a prudent person exercises upon such occasions."

The court, in its charge to the jury, informed them that companies of passengers are not insurers of their safety; but are bound to observe the highest degree of safety; and they are to observe the highest degree of care in carrying them which a reasonable man would use. Their contract is, that they will carry them safely, and as far as competent skill and human strength will go, they will take due care in the performance of their duty.

That the plaintiffs, in the case under consideration, were injured, if the injury is, in any manner, attributable to the want of ordinary care and diligence on the part of Mrs. Fuller in driving the car; such a degree of care and diligence as it was reasonable for her to observe, under the circumstances in which she was placed; such as might reasonably have been expected of her in her situation. It was her duty, upon the arrival of the car at the station and notice given to the passengers to take all reasonable diligence and care to leave the car; and if she failed to do it, the defendants are not liable. So, if she negligently and improperly attempted to leave the car, under circumstances as showed a want of reasonable care and diligence on her part, the defendants are not responsible.

The court then submitted the case to the jury, for them to say, upon the evidence before them, whether the injury was justly attributable to the want of due diligence, care or caution on the part of Mrs. Fuller, or to the neglect of the defendants in not leaving the car at a reasonable time to leave the car in the manner demanded by the plaintiffs.

The jury returned a verdict in favor of the plaintiffs, with damages.

The defendants thereupon moved in arrest of judgment, for the want of the declaration. They also moved for a new trial, on the ground that the court admitted improper evidence offered by the defendants, and for a misdirection to the jury.

BEARD & BUEL (with whom was GIDDINGS), in support of their motions, cited: *G. & S. Turnpike Co. v. Sears*, 7 Sw. Dig. 388; 1 Chit. Pl. 21, 61, 295, 299, 304; *Barnes v. Mass.* 59; *Gould Pl.* 219; *Boorum v. Taylor*, 19

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Conn. 122, 126; 2 Chit. Pl. 117, 118, 271, 272; *Corbett v. Paington*, 6 B. & C. 268; 13 E. C. L. 170; *Buckley v. Collier*, Salk. 114; 3 Salk. 63; 1 *Bright on Husb. & Wife*, 63; *Gay v. Payne*, 4 Conn. 190; *Maine v. Bailey*, 15 Conn. 298; *Weall King*, 12 East, 452; 2 Greenl. Ev. §§ 209, 212; *Derwort Loomer*, 21 Conn. 253.

SANFORD & WOODRUFF (with whom was E. JOHNSON), *contra* cited: 2 Chit. Pl. 119; 2 Greenl. Ev. § 221, n.; *Angell on Carriers*, § 592, n. 2; 1 Chit. Pl. 673-682; *Richards v. Farnham*, 13 Pic. 5; *Lewis v. Babcock*, 18 Johns. 443; *Dale v. Dean*, 16 Conn. 579; 1 Sw. Dig. 776, 777; *Van Rensselaer v. Platner*, 2 Johns. Ca. 18; *Wolcott v. Coleman*, 2 Conn. 324; *Smith v. Cleveland*, 6 Metc. 332; 2 Chit. Pl. 119.

Hinman, J.—The defendants in this case, after verdict for the plaintiffs, moved in arrest of judgment, on the ground of the insufficiency of the declaration. The objections to the declaration are, that it does not state that the defendants are carriers; or that they had power, by their charter, to become common carriers; that the several counts each join a claim for damages on account of the wife's personal injury, with a claim for the expenses of her cure; that, in the counts, the promise is alleged to have been made to the wife, and in the third count it is alleged to have been made to both husband and wife; that a valid promise cannot be made to a married woman, and she cannot sue in assumpsit for any claims originating after coverture; and lastly, it is said, the first count is in assumpsit, on the promise, and the two last counts are founded on the negligence of the defendants, and so are counts sounding in tort.

These several claims will be considered in their order.

1. Does the declaration allege, that the defendants are common carriers, or carriers of passengers, or that they have power, by their charter, to become carriers? We think it does. After stating that the defendants were the owners of a certain railroad running through the town of Waterbury and Plymouth, and of certain cars for the conveyance of passengers upon said road, it then goes on to say: "And the defendants on the day aforesaid were the owners and proprietors of, and were running and propelling a certain train of passenger cars upon said road for the carriage and conveyance of passengers, for a certain reasonable

d to the defendants." Now, a common carrier is one
 al business it is to carry; and the substance of these
 is, that the defendants owned all the property and
 s usually employed by carriers of a certain description
 companies—and that they were, at the time, engaged
 of this property, for the conveyance of passengers. We
 is enough, without a statement of the length of time
 ants had been engaged in the business, or any direct
 re allegation that they were common carriers. In this
 e counts conform to the precedents found in Chitty,
 differ from them, are rather more precise than those

ot necessary to allege that the defendants had power,
 arter, to become common carriers. They are alleged
 road corporation, owning cars, and engaged in run-
 on their road, for the conveyance of passengers. If
 it follows, that, so far as third persons are concerned,
 be presumed to have authority to do the business they
 elves out as competent to do. They will not be pre-
 engaged in an unlawful business; and being engaged
 ession, and, in its pursuit, having made with the plain-
 tract declared on, they ought not now to be heard to
 ad no power to do so. *Wood v. N. Y. & N. H.*
 3 Conn. 618.

claimed that the declaration asks for damages on
 the wife's personal injury, and also for the expenses of

the counts, after stating the wife's personal injuries,
 tent of it, then goes on to say, that, by means of the
 became sick, was prevented from attending to her nec-
 ers, "and also thereby they, the plaintiffs, were forced
 to and did necessarily pay, lay out, and expend, a
 of money, to wit, the sum of two hundred dollars, in
 endeavoring to be cured of the bruises," etc.

ar that the plaintiffs could not recover for the wife's
 jury and also for the expenses of her cure in the
 n. On the former ground of damages, the husband
 e no interest, while the latter would accrue to him
 so the two claims would be incompatible with each

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other. But we do not think this declaration open to that objection. Indeed, it may fairly be doubted whether it was framed with that object in view. The ground of the action was the wife's personal injury alone; otherwise, she could not have been made a party at all; and, we think, the statement in regard to the expenses of her cure may well enough be considered as descriptive of the extent of her injury, rather than as a distinct and substantive ground of damages—as saying, in substance, that she was so hurt that it had already cost two hundred dollars to cure her. In this aspect, the allegation though unnecessary, is still very proper.

But suppose the pleader intended it as a distinct ground of recovery, and that it is so expressed as to bear that construction only, still we think it clear that it does not vitiate the declaration. In every instance this claim is inserted as matter of aggravation, and not, as of itself, constituting a ground of recovery. The gist of the action is the breach of contract in not carrying the wife safely. It is stated, as one consequence of that, that the plaintiffs were obliged to expend money in paying for medical attendance. For that the plaintiffs cannot recover; and if that was the sole ground of damages it would be fatal to their case. But as there was a ground for which they could recover, it will be presumed that the court allowed no proof to be given of a ground on which they could not, although stated in the declaration.

3. It is said, there is a misjoinder of counts in the declaration, the promise in the first two counts being as made to the wife and in the third, as made to the plaintiffs. It is true, the third count uses the plural word "plaintiffs" when stating the persons to whom the promise was made; but it is preceded and followed by language which shows that the wife only was meant. Immediately preceding the allegation of the promise, it is stated that "in consideration that the said Betsey Fuller, at the special instance and request of the defendants, had then and there engaged a seat and place, by a certain other car, to be carried and conveyed thereby to Plymouth aforesaid, for certain other reasonable hire and reward to the said defendants in that behalf paid and received, they, the said defendants, then and there undertook," etc., "that due and proper care should be observed

the carrying, conveying, and delivering her, the said such passenger as aforesaid;" and then it goes on to the said Betsey, confiding in said promise, became such

It was, then, the wife that engaged the seat and for passage; and it was for her benefit that the promise. We think, therefore, the fair reading of the count is, promise was made to her, although its language, if not by the whole frame of the count, would include both

claimed, that a married woman cannot sue in assumpsit, act made subsequent to the coverture; on the ground, loses in action accruing to her, vest absolutely in the and, under some of our decisions, this is the most material in the case. It is said the husband paid for her passage; therefore, the promise must be presumed to have been made to him. This is contrary to the express allegation in the count in which it is explicitly alleged that she paid for her passage; but then it is insisted, that as husband and wife are one person in law, the money that she actually paid must be presumed to be paid by him, and so the consideration of the promise moved to him. As a wife, however, may have separate estate, over which her husband can have no control, and may make contracts binding her estate only, and not the husband's, it is obvious that paying money out of such separate estate could raise a claim in the husband's favor founded upon the idea that the consideration moved from him. As, then, the money which she paid on that occasion might have been her separate property, we cannot find, after verdict, on a declaration alleging that she paid for the promise, and that the promise was made for her benefit, to presume the facts to be as alleged, unless necessary to do so in order to sustain the verdict. But we cannot place the case on this narrow ground; for although the expressions used by our judges in some cases, which support the notion that all choses in action accruing to a wife during coverture vest absolutely in the husband, yet there are many in which this point is supposed to have been decided in favor of the wife, and they are not distinguishable from this case. None of them involve promises or obligations relating to the wife's personal property; they were all mere money claims, for liquidated debts;

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and some of them were cases where the contest was between wife, or her representatives, and the husband's creditors. And it is not improbable that the inclination our courts have always felt to subject all a debtor's property to the payment of his debts, and to guard against any possible evasion of this liability, have led to our peculiar decisions on this point. However may be, the principle which our courts have established on this subject is undoubtedly a departure from the common law, and ought not to be extended so as to operate unjustly. The rule of law is, that in all cases where the cause of action will survive to the wife, she may join with her husband in a suit upon it. This rule has not been affected by the cases to which we refer. The application has been narrowed, by leaving the cases in which the cause of action will survive less in number, but the rule remains the same before. If, then, the cause of action would survive to the wife in this case it must follow that she may join her husband in a suit upon it. Now the defendants admit that an action on the case for their neglect of duty in not carrying the woman safely, might be sustained by her.

The question, then, is narrowed down to this—whether our decisions have so far destroyed the identity of the wife, as that a binding promise cannot be made to her for any purpose—even for her personal security. Now, whatever may be said of the result to which the reasoning of some of our judges leads, we have no idea that they intended to sanction any such doctrine. The truth seems to be, that our late cases on this subject rest on the authority of *Griswold v. Penniman*, 2 Conn. 564; and that case rests upon the notion that, because a husband may sue alone for most choses in action accruing to the wife during coverture, they vest absolutely in him. This, says Judge Swift, “clearly proves that they vest in him absolutely.” Previous to the case of *Griswold v. Penniman*, our court of errors had decided that an agreement between husband and wife was absolutely void, unless made through the intervention of a trustee. *Hutton v. Dibble*, 1 Day, 221; *Nichols v. Palmer*, 5 Day, 47.

This doctrine carried out would, perhaps, sustain the case in *Griswold v. Penniman*. The common law doctrine, that a husband may sue alone, or join his wife, on choses in action accruing to her during coverture, is founded upon the principle that he is

on not to reduce such choses in action to possession; courts, at that day, might have considered such an election a void agreement, under the case of *Dibble v. Hutton*. If this may be, it is clear that Judge Swift's principle does not apply to a case like this. The converse of the ground of that case is true here. For the personal injury of the wife, the husband never could sue alone. He has no direct interest in that injury, whatever, unless in consequence of it he loses her society and service. For that he might sue; but not for the pain she suffers. If, then, it is true, that his right to sue alone proves that choses in action vest absolutely in him, it must follow that where he has no such right they do not vest in him; and in a case of this description, it must follow that the suit is properly brought in the name of the wife.

It is stated in the motion, that the first count was laid in trespass, and the other counts in tort, has not been insisted upon in the plea. We presume it was intentionally abandoned; as all the counts seem to have been taken from established precedents of forms given under the head of assumpsit.

In the motion for a new trial, it is claimed that the court refused to admit evidence to prove that the wife gave money to the husband to buy a ticket for her passage in the cars; that such money was procured, which she took, and also took her seat in the cars to be conveyed to Plymouth. It is said this evidence would prove that the contract was made with the husband, and not with the wife, and that the money she paid for the ticket must be presumed to have been his. This might be a plausible claim, if it were possible for a married woman to have separate property; but if she may have such property, it is obvious the money paid might have belonged to either of them, and there might have been evidence showing to which it did in fact belong. The evidence in this case is that it did not conduce to prove the contract. We are not bound to decide; whether it was sufficient for the purpose, we are not bound to decide.

It is said, that no express contract was made with any person, and that the law will imply a contract only with the husband, because he paid for the ticket. We have already seen that it does not appear who paid for the ticket, unless the fact that the money came from her hand is presumptive evidence that it

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belonged to her. We do not think there is any presumption it was his alone. Besides, it does not appear whether the presumption was expressed or implied. The motion does not profess to review the whole evidence in the case; and so far from presuming the contract was an implied one, we should be bound, rather, to presume that it was express, if it were necessary to do so in order to sustain the verdict. These reasons are sufficient to dispose of this claim; but it ought not to be understood that we intend to sanction the notion that the law will imply a contract only with the party who pays the money in such a case as this. It would seem more reasonable to suppose that the implied contract, wherever it might be, would be with the party in interest in it. If there was a contract to pay for the wife's labor, it would generally be to the husband, because he alone is interested in it; but if, for her personal security, it must be to her, if anyone, because he has no interest in that. But it is not necessary to pursue the subject further.

The injury for which the action was brought occurred at the station, or usual stopping place, at Plymouth; and the plaintiff claimed it was in consequence of the cars not stopping the usual time, or long enough to give the passengers for that place a reasonable opportunity to leave. Under this claim the plaintiffs gave evidence of the usual and customary period of the cars stopping at that place; and it was claimed that such evidence was irrelevant and ought not to have been received. We think it was proper, for the purpose of showing what the defendants had considered a reasonable time to be allowed the passengers to leave at that station; and, if the time allowed for that purpose, on that occasion, was shorter than the usual and customary time, it would tend somewhat to show that a reasonable time was not allowed. The evidence probably was not very important, but we cannot say that it was improper.

The remaining question arises upon the charge of the court. It is said that it requires too high a degree of care in the defendants.

But the rule laid down by the judge was the one adopted by this court in *Hall v. Conn. River S. Co.*, 13 Conn. 319, and has been acted upon ever since. It is too well settled to require re-examination.

the whole case, then, the motion in arrest is advised to be
 , and no new trial is advised.

in arrest overruled. New trial denied.

MAN v. THE FAIR HAVEN & WESTVILLE RAILROAD COMPANY. (1)

Supreme Court of Errors, Connecticut, December, 1877.

[Reported in 45 Conn. 284.]

D COMPANY LIABLE FOR INJURY TO BOY JUMPING
 CAR ALTHOUGH HE HAD NOT PAID FARE.—Where
 years that a boy ten years of age was riding on a street railway car
 t having paid his fare, but with the knowledge and consent of the
 and conductor, who had no authority to carry passengers free, and
 printed notice was posted in the car forbidding passengers to get
 off the front platform, or while the car was in motion, and declar-
 at the company would not be responsible if any accident happened
 y, and the boy at the request of the driver took some papers to
 at a place where he intended to get off, and without notice to the
 tor or driver, while the car was in motion and before it reached
 ended place of stopping, jumped off the front platform and was
 , and it was found by the trial court that the boy in getting off,
 the circumstances, used as much care as could be expected from a
 of his age, and that no contributory negligence on his part was
 : Held, that the railroad company was liable.

SS on the case for an injury to the plaintiff through the
 e of the defendants, a horse railroad company, brought
 erior Court in New Haven County, and heard in dam-
 demurrer overruled, by Hitchcock, J. The court made
 ng finding of facts:

e time of the injury complained of the plaintiff was nine
 eleven months old; he was of ordinary mental capacity,
 read and write.

efendants were a corporation, legally created, and as
 operating a horse railroad from the city of New Haven,
 a terminus, to Fair Haven, its eastern terminus.

e morning of September 23, 1872, about seven o'clock,
 of the defendants was running to its eastern terminus,

in *Farrell v. Waterbury, etc. R. Co.*, 60 Conn. 239, 253.

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and was within half a mile of it, the plaintiff, who was well known to the driver of the car, asked the latter if he might ride on the car; the driver assented, and the plaintiff thereupon got on the east platform of the car with the driver, for the purpose of riding to the Fair Haven post office, to find the man from whom he received papers to distribute, which was less than a quarter of a mile distant. He was a newspaper carrier. While on the platform, as the car was approaching the post office, the driver requested the plaintiff to take a package of newspapers, then lying on the platform, and deliver it at the Fair Haven post office, which the car was about to pass; and the plaintiff manifested to the driver his willingness to do so. The driver did not stop or slacken the speed of the car as it came near or arrived at the post office; and it was then going so fast that the plaintiff did not get off, but he kept on with the car to the eastern terminus of the road (which was but a short distance), where the horses were unhitched from the east end of the car and hitched to the west end of it, and started westward for New Haven, the plaintiff being on the car, but intending to go back on it no farther than the post office.

"Soon after the car had started westward for New Haven the driver requested the plaintiff to bring the package from the east end to the west platform of the car, which the plaintiff did; and at the same time he again requested the plaintiff to deliver the package at the post office.

"When the car, on its westward course, arrived within about eight feet of the post office, the driver did not stop the car, but continued it at its ordinary speed. The plaintiff, under these circumstances, attempted to get off from the west end of the car at the post office, having at the time the package under his right arm, and with his left hand he had hold of an iron handle on the end of the car. In thus getting off the lower step of the west platform, the plaintiff, by the onward motion of the car, swung under the forward wheel on the south side, which ran over his leg and caused the injury complained of. This injury was the result of the careless and negligent driving and management of the car by the defendants' driver and conductor. The plaintiff, in getting off the car under the circumstances, used as much care, caution and prudence as could be expected from a person of

contributory negligence on his part is found to have been. The first the driver or conductor knew of the plaintiff getting off the car was by a signal to stop from a by-stander. The car was then immediately stopped within a distance of ten feet.

The driver knew that the plaintiff was on the car as it started on its way to New Haven, and the circumstances under which it was stopped, and that he intended to go no farther on it than the post office, and that he was there to deliver the package. There was no evidence as to whether the place where the plaintiff got off was a proper or improper one to get off, and no evidence was raised during the trial.

The plaintiff paid no fare but was riding free of charge. By the terms of the contract with the defendant company, neither the driver nor conductor had authority to carry or allow persons or packages on the car without the payment of fare or freight.

At the time of the injury the following notice, printed in large letters, was conspicuously posted at each end of the car:

PERSONS ARE FORBIDDEN—1. To get on or off, or to stand on the forward platform. 2. To occupy the rear platform or the standing room inside. 3. To stand on the steps, or to lean over the cars when in motion. 4. To put their heads or hands out of the windows. . . . 7. The company will not be responsible for any accident occurring under a violation of any of the above rules.

The plaintiff was committed to the care of the company for conveyance. He was carried on the front platform, where the driver had to look after him and see that they did not leave the car without his knowledge, though it was not his duty, but that of the conductor, to deliver the same.

Under the rules of the company it was the duty of the driver to look after his team, and to look ahead, and to the right and left of the car; he had no duties as to passengers other than those of a careful driver, and neither he nor the conductor had authority to allow transit of persons or property on the car without the payment of fare or freight.

The evidence offered by the plaintiff to show that he intended to get upon and ride on the car by the driver and conductor, and with their knowledge and consent, past the post

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office to the eastern terminus, and thence back to the place where the injury occurred, the defendants objected, upon the ground that neither the driver nor conductor had power to give the plaintiff a free ride; that the driver had nothing to do with persons on the car; that neither was an agent of the defendants for any purpose; and that there was no allegation in the plaintiff's declaration to which such evidence could be applied, or which it tended to establish; but the court overruled the objection and admitted the evidence.

"The plaintiff, for the purpose of showing that he was a trespasser on the car, but was there with the knowledge and permission of the defendants, and to show that the driver knew he intended to get off at the post office, and was negligent in stopping the car for him to get off, offered evidence to prove that the driver requested the plaintiff to take the package of newspapers, then on the platform, and deliver it at the post office, and that the plaintiff assented to the request, and that it was while he was getting off the car with the package that he was injured. On the admission of this evidence the defendants objected, on the ground that the driver was not their agent for the purpose of leaving papers at the post office, or requesting or employing the plaintiff to do so; and on the further ground that if the court should be of the opinion that the driver was their agent for that purpose, then his employment of the plaintiff, if within his authority, made the plaintiff his fellow servant, for whose injury in the manner above described the defendants would not be liable; and on the further ground that the evidence was not relevant to the question presented by the plaintiff's declaration. The court overruled the objection and admitted the evidence.

"The defendants claimed that under the facts they were not liable for the injury; that the plaintiff was a trespasser on the car, and that they owed him no duty, except not wantonly (or by gross carelessness, tantamount to wantonness) to injure him; that they did not owe him even that till he was aware of his presence on the car; that they owed him no duty to stop and let him off when he requested to do so, or at least till he was made aware that he proposed to get off where he did; and that it was of itself a negligent and careless act to get off the forward end of the car while the car was in motion. The defendants claimed that upon the undisputed

the case and upon the facts as found, as matter of law, are not liable in this case. The court overruled these and rendered judgment for the plaintiff for full damages.

defendants moved for a new trial for error in the rulings of the court.

The case was argued at a former term of the court, and re-argued at the present term by direction of the judges."

WATROUS, in support of the motion, cited: *Young v. Haven*, 39 Conn. 435; *Derwort v. Loomer*, 21 Conn. 245; *Lyndsay v. Suffield*, 30 Conn. 129; *Lyndsay v. Conn. & P. R. Co.*, 27 Vt. 643; *R.R. Co. v. Skinner*, 19 Pa. St. 298; *Penn. v. Beale*, 73 Conn. 503; *Lake Shore, etc. R.R. Co. v. Mich.* 274; *Flemming v. W. P. R.R. Co.*, 49 Cal. 47; *Baulec v. N. Y. C. R.R. Co.*, 49 N. Y. 47; *Park v. O'Brien*, 23 Conn. 339; *Glastonbury*, 29 Conn. 204; *Carey v. Day*, 38 Conn. 463; *Nichols v. Midd. R.R. Co.*, 106 Mass. 463; *Cram v. Met.*, 112 Mass. 38; *E. S. R.R. Co. v. Bohn*, 27 Mich. 503; *E. & N. Am. R.R. Co.*, 58 Maine, 384; *Balt. City R.R. Co. v. Wilkinson*, 30 Md. 224; *Solomon v. C. P. etc. R.R. Co.*, 298; *Hadencamp v. S. A. R.R. Co.*, 1 Sweeney, 490; *Is v. N. Y. C. R.R. Co.*, 58 N. Y. 248; *Burrows v. Erie*, 63 N. Y. 556; *Patterson v. Phila. etc. R.R. Co.*, 41 103; *U. P. R.R. Co. v. Nichols*, 8 Kan. 505; *Ill. Cent. v. Godfrey*, 14 Am. Reg. 290; *Jeffersonville, etc. R.R. Co. v. Goldsmith*, 7 Ind. 43; *Shear. & Redf. on Neg.* §§ 63, 64; *Thames Steamboat Co. v. Housatonic R.R. Co.*, 24 10; *Crocker v. New London, etc. R.R. Co.*, 24 Conn. 556; *Stephenson v. H. R.R. Co.*, 2 Duer, 343; *Wilson v. Peverly*, 2 N. H. 275; *Oxford v. B. & M. R.R. Co.*, 23 N. H. 275; *Oxford v. 8 Ill. 434*; *Wright v. Wilcox*, 19 Wend. 343; *Bristol v. First Nat. Bank*, 41 Conn. 421; *New Orleans, etc. v. Harrison*, 48 Miss. 112; *Gould's Pl.* 160, § 7; *Doughtham*, 41 Conn. 237.

DOOLITTLE and W. L. BENNETT, *contra*, cited: *Beers v. N. Y. C. R.R. Co.*, 19 Conn. 566; *Park v. O'Brien*, 23 Conn. 339; *Lyndsay v. City of New Haven*, 39 Conn. 435; *Eckert v. L. Co.*, 43 N. Y. 502; *Filer v. N. Y. C. R.R. Co.*, 49 N. Y.

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47; *Belton v. Baxter*, 58 N. Y. 411; *Thurber v. H. B. etc. R. Co.*, 60 N. Y. 326; *Gaynor v. Old Col. R.R. Co.*, 100 Mass. 2; *Mayo v. B. & M. R.R. Co.*, 104 Mass. 137; *Brooks v. Somerville*, 106 Mass. 271; *Sleeper v. Sandown*, 52 N. H. 244; *State v. & L. R.R. Co.*, 52 N. H. 563; *O'Flaherty v. U. R.R. Co.*, Mo. 70; *Schierhold v. N. B. etc. R.R. Co.*, 40 Cal. 447; *Detrol*, etc. R.R. Co. v. *Von Steinberg*, 17 Mich. 118; *R.R. Co. v. Glendon*, 15 Wall. 401; *R.R. Co. v. Stout*, 17 Wall. 659; *Wharton*, Neg. §§ 354, 420; *Pittsburg, etc. R.R. Co. v. Caldwell*, 74 Penn. St. 421; *Crissey v. Hestonville, etc. R.R. Co.*, 75 Id. 83; *Pittsburg City R'y Co. v. Hassard*, Id. 367; *Wilton v. Midd. R.R. Co.*, 1 Mass. 108; *E. S. City R.R. Co. v. Bohn*, 27 Mich. 503; *Bagley v. Manchester, etc. R.R. Co.*, L. R. 8 C. P. 148; *Lack, etc. R.R. Co. v. Chenewith*, 52 Penn. St. 382; *Pitts. etc. R.R. Co. v. Caldwell*, 74 Id. 421; *Phila. etc. R.R. Co. v. Derby*, 14 How. 46; *Drew v. Sixth Av. R.R. Co.*, 26 N. Y. 49; *Carroll v. N. Y. etc. R.R. Co.*, 1 Duer, 571; *Jacobus v. St. P. & C. R.R. Co.*, 20 Minn. 125, 134; *Dunn v. G. T. R.R. Co.*, 58 Me. 187; *Col. etc. R.R. Co. v. Powell*, 40 Ind. 37; *Gr. N. R.R. Co. v. Harrison*, Exch. 376; *Austin v. Gr. W. R.R. Co.*, L. R. 2 Q. B. 44; *Lovett v. Salem, etc. R.R. Co.*, 9 Allen, 557; *Pitts. etc. R.R. Co. v. Donohue*, 70 Penn. St. 119; *Rounds v. Del. etc. R.R. Co.*, 64 N. Y. 129; *N. W. R.R. Co. v. Hack*, 66 Ill. 238; *Lynch v. Nurdin*, 1 A. & El. N. S. 29; *Johnson v. Patterson*, 14 Conn. 1; *Birge v. Gardiner*, 19 Id. 507; *Daley v. N. & W. R.R. Co.*, 19 Id. 591; *Isbell v. N. Y. etc. R.R. Co.*, 27 Id. 393; *Woolf v. Chas. & A. Co.*, 31 Id. 121.

Carpenter, J.—The plaintiff at the time of the accident was ten years old. He was riding on one of the defendants' cars with the knowledge and consent of the conductor and driver, but without paying fare. He was requested by the driver to take a package of newspapers which was being carried upon the car, and to leave it at the post office in Fair Haven, where the boy intended to get off. He took the papers, and without notice to the conductor or driver, and while the car was in motion, before reaching the crossing where the car usually stopped, stepped off at the forward end of the car, and in doing so was thrown under the wheel and received the injury complained of. The managers of the car had no authority to carry passengers free. A notice was

ously posted in the car, printed in large letters, forbidding passengers, among other things—"1. To get on or off, or to stand on the forward platform." . . . "3. To stand on the car when in motion." And at the following: "The company will not be responsible for any accident occurring under a violation of any of the above

The court found "that this injury was the result of the careless and negligent driving and management of the car by the defendant and conductor of the same. The plaintiff in getting on the car, under the circumstances, used as much care, caution and diligence as could be expected from a person of his age, and contributory negligence on his part is found to have been

The court rendered judgment for the plaintiff, and the defendant was ordered to pay for a new trial.

In considering the main question in the case, we will briefly review the objections to evidence.

The evidence offered by the plaintiff to show that he was injured while riding on the car by the driver and conductor, the defendant has objected, "upon the ground that neither the driver nor conductor had power to give the plaintiff a free ride, and that it was nothing to do with persons on the car; that neither the driver nor conductor had authority to receive passengers on the car for any such purpose."

The court says this objection is not well taken. The defendants' car was being driven and directed by the conductor and driver. It was within the scope of their authority to receive passengers on the car and to get them off. Their action was the action of the company. The defendants, therefore, received the plaintiff as a passenger. This fact cannot be affected by the omission of the conductor to collect fare. Moreover, the matter thus proved was a part of the *res gestæ*; it shows the time and manner of the accident and the circumstances attending it.

The plaintiff, for the purpose of showing that he was not a trespasser on the car, but was there by the knowledge and permission of the driver and conductor, and to show that the driver knew that the plaintiff was to get off at the post office, and was negligent and careless in the management of his team, and in driving the car, and in not stopping for the plaintiff to get off, offered evidence that the

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driver requested the plaintiff to take a package of newspapers, to go on the platform, and deliver it at the post office, and that when the plaintiff was getting off the car with the package he was injured. This evidence was objected to on the ground that the driver was not the agent of the defendants for the purpose of leaving papers at the post office, or requesting or employing the plaintiff to do so.

We think this evidence was admissible for some or all of the purposes for which it was offered. It seems that the defendants were accustomed to carry packages and parcels on their car, and that both the conductor and driver had some duty to perform in respect to them. Admitting it to be true, as the objection assumes, that the driver was not authorized to leave the papers at the post office, or to employ the plaintiff to do so, still the evidence was admissible to show that the driver knew that the plaintiff was on the car, and was intending to get off at the post office, and we think that such knowledge has some bearing upon the question of negligence.

The objection that requesting the plaintiff to take charge of the papers constituted him an employee of the defendants, if true, is hardly a reason for excluding the testimony. It was still admissible for the purposes for which it was offered. But we do not consider that the plaintiff was in any sense an employee of the defendants. He was merely requested, as any other passenger might have been, as a friendly act, to deliver the papers. This did not constitute the relation of master and servant.

The objection that the declaration avers no negligence "in not stopping the car" cannot avail the defendants. It is alleged that the defendants "so carelessly, negligently and unskillfully managed and directed said car as to run said car upon and over the plaintiff." That is certainly broad enough to admit proof that the negligence consisted in part in not stopping the car at a proper time.

We now come to the principal and most important question in the case—the claim of the defendants that the facts found do not show, as a matter of law, that the defendants were guilty of negligence, and that the plaintiff was guilty of contributory negligence; and that the finding to the contrary by the Superior Court should under the circumstances be disregarded.

finding of negligence on the one hand and of due care on the other was merely a conclusion of law from the facts stated, would have been a legitimate question for us to consider. On the contrary, negligence and due care are simply questions of fact, then the case is placed beyond our reach by the

question is ordinarily a question of fact and has been so held by this court. Sometimes, however, it has been held to be a mixed question of law and fact, especially in cases where the questions raised have been heard and determined. We think it must be regarded as a question of fact here. If, however, it were to be considered as a mixed question of law and fact, we should even then find it difficult upon any recognized principles to disturb the judgment.

It is admitted that the plaintiff was a trespasser on the defendant's car, his right of action is not necessarily thereby defeated, but it is unnecessary to discuss this question, as we think it can hardly be viewed in the light of a trespasser. He was on the car—was there by the consent of the defendants. They had a right to collect fare, and as between them and their employees it was their duty to do so. Their failure to do this duty did not make him a trespasser, and did not deprive them of the obligation to use reasonable care not to injure

the passengers. As facts as they appear there is some evidence of negligence. Negligence is a relative term. Conduct which might be negligent at one time or in respect to one person, might not be at another time or in respect to another person. Much necessarily depends upon the condition and circumstances of the parties. If the plaintiff had been an adult, perhaps the notice posted at the entrance of the car, forbidding passengers to get on or off the platform or while the cars were in motion, and that the carrier would not be responsible for accidents occurring in consequence of any violation of these rules, would have been all that would have been required of them. There is room for the argument that he could read the notice, and that he did read it, but that he had sufficient judgment and discretion to heed it. The case before us is that of a mere child. He may or may not have read the notice. If he read it he may not have com-

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prehended it. If he comprehended it the thoughtlessness of his childhood may have caused him immediately to forget it and consequently to disregard it. Under these circumstances there was some obligation resting upon the driver and conductor to see that these rules were complied with.

It is perfectly natural for a boy of that age, if allowed to do as he pleases, to disregard such rules. Some restraining authority seems to have been called for in this case and none was exercised. Thus it would seem that there may have been negligence in managing and directing the car in respect to this boy, whereas the same circumstances in respect to a person of mature years would not constitute negligence. An adult might have stepped off the car with impunity, and the driver might properly have allowed him to judge and act for himself. Not so with this boy. He knew he was on the front platform in violation of the rules. Had he enforced the rule and sent him inside the car probably the accident would not have happened. He knew, also, that the boy intended to get off the car. If, instead of sending him inside, he had allowed him to get off, but had restrained him until he had stopped the car, then there would have been no accident. And, too, if the conductor had looked after the plaintiff he might easily have been kept within the rules and the accident have been prevented.

These remarks are applicable to some extent to the other branch of the case—due care on the part of the plaintiff. The court found that he "used as much care, caution and prudence as could be expected from a person of his age." Conduct which might not ordinarily be expected from such a boy might be negligence on the part of an older person.

But whether the court erred in arriving at conclusions of fact is immaterial. We are unable to see that it erred in the application of legal principles.

A new trial must be denied.

T. V. BALTIMORE AND OHIO RAILROAD CO.

Supreme Court, District of Columbia, January, 1875.

[Reported in 2 MacA. (9 D. C.) 42.]

ANNOUNCEMENT OF STATION—INJURY TO PASSENGER
KILLING.—In an action against a railroad company where it
appeared that the train stopped some distance from the depot in the
evening, and upon the name of the station being announced by some
passenger after inquiring from a fellow passenger the name of the
station, and that the announcement was not countermanded
until the passengers were warned not to leave; that the passenger
went to go out of the car door, when the train started and moved into
the depot, and she was afterwards found lying by the track so much
injured that she died in a few days, it was *held* to be error to instruct
the jury that the passenger had a right to presume that the announce-
ment was made by an agent of the company and that it was the
duty of the company to countermand the false proclamation of their
agent and to keep an agent within reach of the passengers who would
be able to advise them of the truth or falsehood of the proclamation.

Suit instituted by plaintiff to recover damages for injuries
suffered by his wife while a passenger on defendant's railroad, in
consequence of which she soon afterward died; and as is set forth
in the declaration: "By reason whereof he, the said plaintiff,
deprived of all the comfort, labor, benefit, and assistance of
his wife in his domestic and business affairs, which he other-
wise might or would have had, and he, the said plaintiff, was
then and there forced and obliged to pay, lay out, and
and hath necessarily paid, laid out, and expended, divers
sums of money in providing for medicines and medical and surgi-
cal attendance, and in and about her burial, and had also divers
expenses amounting to the sum of about \$1,000, and suf-
fered great mental agony in consequence of the great suffering
of his said wife. Wherefore, the plaintiff claims dam-
ages in the sum of \$25,000 and costs of suit."

On all of exceptions presented the facts as follows: "Plaintiff
adduced evidence tending to show that, on December 2, 1872, his
wife purchased at defendant's depot in Washington city a return-
ticket from Washington to Baltimore and back; that she went
to Baltimore and returned on the same evening to Washington;
and, approaching the depot at Washington, late in the evening,

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the train stopped some distance from the depot and 'Washington' was called by someone, whereupon plaintiff's wife inquired of one of the witnesses, also a passenger, if they were in Washington, upon his replying in the affirmative, prepared to leave the car; that the night was dark, so that the location of the train could not be ascertained by looking out of the window; that the announcement of Washington was not countermanded, and there was no warning given to passengers not to leave the train; that many passengers in fact left it, among them the plaintiff's wife, who was seen to go out of the car door, and before her daughter, who was with her, had time to get out of the car, the train suddenly started again and moved into the depot; that the *plaintiff's wife* was afterward found lying by the track near E Street, about ten squares outside of the depot, with the toes of her right foot crushed by the wheel of the car and the heel of her left foot injured; that partial amputation of the right foot was made. About ten days lockjaw set in, and that death ensued as the result of her injuries, on January 3, 1873. Plaintiff further offered evidence tending to prove the expenses he was subjected to by the accident and the value to him of his wife's services; and that the said expenses and the cost of employing another person to do the work and service his wife had before done, about his house, was about \$500. It further appears from the plaintiff's testimony, that he had for some years kept a saloon and restaurant on New Jersey avenue, a short distance south of the defendant's passenger depot, and that his wife had often traveled over defendant's road and was familiar with the depot and its surroundings.

"After plaintiff had closed his testimony, defendant offered evidence, tending to show that the train upon which the plaintiff's wife was, on the occasion in question, was the New York through express train, and that it did not, in fact, stop between Bladenburg and the passenger depot in Washington, but only slowed down as it approached said depot; and that the train which stopped on the evening in question, as shown in the testimony on the part of the plaintiff, was another train known as the local express train from Baltimore, which arrived a few minutes after the other, and was detained briefly outside, until the latter could be removed from the depot; that the two trains were made up at and started from the same platform in the station at Baltimore.

a short interval of time between them; that, on the question, no officer of the company announced the arrival of the said New York train at Washington before it reached the depot; nor is it their habit to announce such arrival at night when it takes place late at night and passengers are sleeping; that Mrs. Pabst was found by some employees of the company between an outer and inner track, near E Street, nearly as distant from the depot, as the New York through train was coming in, and just in the rear thereof, and before the arrival of the second train. Defendant further offered evidence to show that Mrs. Pabst was near the rear of the second passenger cars; that there was a brakeman between the first and second cars, and between the two rear cars, but none between the second and third cars, where she was, and the third."

Exceptions were taken to prayers granted and refused. The opinion of the court in general term was confined to the question whether the proclamation was made in accordance with the general instructions of the court below to the effect that the charge excepted to being as follows:

"If the proclamation of arrival at Washington was made, it is presumed it was made by an employee of the company. Contrary is shown, and if made by other sources than an employee of the company, that it should have been countermanded by the company.

In reference to the outcry, if you find from the testimony the train reached the depot and came to a state of rest—for both the law and the facts justify a passenger in leaving it, I think—and no proclamation was made that it had arrived at Washington by proclamation 'Washington,' the passengers had a right to presume in the midst of the darkness that surrounded the car at that time, and from the fact that the car was at rest, that the train had stopped, that the proclamation proceeded from the company, the agents of the company, or the agent of the company, and if it did not so proceed, I charge you that the company held such relation to that train under the law that they were undermand a false proclamation of their arrival. In such a case, it was the duty of this company to maintain upon the train, and within the reach of those passengers, an agent that was able to advise them of the truth or falsehood of that proclamation. And if the proclamation came either from the

mouth of their agent, or was unauthorized, but was uncondemned through their agency, under the law, the company would be derelict in its duty, and chargeable with the consequences. That is the point to which my attention has been particularly called. Now, as you shall find, gentlemen of the jury, in this case, that the train proceeded to the depot without stopping on the contrary, that it paused, and a proclamation that they had arrived was made, you will find for plaintiff or the defendant. It would have been an act of carelessness on the part of the deceased, or an act of indiscretion on the part of a passenger to leave the train, or attempt to do so, while in motion; it would be an act of carelessness and indiscretion on the part of the agents of the company, after having come to a standstill, with a proclamation of the car of arrival, to start up without having a guard against injury. This is all that remains for the court to say in reference to the issue of liability or otherwise."

The jury rendered a verdict for the plaintiff for \$3,568.25.

Defendant moved for a new trial upon the bills of exceptions and for excessive damages. The latter question is presented on appeal from the order of the court overruling the motion.

FREDERICK SCHMIDT and WILLIAM F. MATTINGLY, for plaintiff, cited: Rule 101, R. S. § 6461; Rule 69, R. S. § 6461; Sedg. on Dam. 601; 14 How. 486; Phil. & Read. R.R. 16 How. 469; Laing v. Colden, 8 Penn. St. 479.

WALTER S. COX, with whom was J. A. BUCHANAN, cited: 2 Redf. on Rail. 204, 205, 206, §§ 178, 179, p. 213, § 178; Damont v. N. O. & C. R'y, 9 La. Ann. 441; Pitts. & C. F. Co. v. McClurg, 2 Am. R'y Cas. 546, 547 and 56 Penn. St. 2; Lewis v. B. & O. R.R., 38 Md. 588; Shear. & Redf. Neg. § 2 and note 3, citing Forsyth v. Albany R.R., 103 Mass. 510; Bridges v. N. L. R'y Co., 6 Q. B. 377; Shear. & Redf. Neg. p. 333, note 1, and cases cited; pp. 351, 352, § 260; Baker v. Bolton, 1 Camp. 493; Cary v. Berkshire R.R., 1 Cush. 4; Sago v. Ports. R.R. Co., 4 Allen, 55; Conn. Mut. L. Ins. Co. v. N. Y. & N. H. R.R. Co., 25 Conn. 265; Green v. H. R.R. Co., 4 Keyes, 294; Eden v. L. & F. R.R. Co., 14 B. Mon. 204.

Wylie, J.—This action was brought to recover damages sustained by the surviving husband in consequence of injuries which happened to his wife on the 2d December, 1872, from the car

of defendants' servants and agents, as alleged, from the 3d of January, 1873. The verdict was in favor of the plaintiff for \$3,568.25. Several exceptions were taken to the rulings of the court before which the case was tried at and among them the refusal of the court to set aside the verdict for excessive damages. In cases tried under the common law the refusal of the court to set aside a verdict on this ground is alleged for error in the appellate court, but the decision of the court below is final. It is claimed, however, that this rule has been changed by the following provision of the act under which this court was established: "The justice who tries the case may, in his discretion, entertain a motion to be made on the day of the trial to set aside a verdict and grant a new trial on exceptions for insufficient evidence, or for excessive damages; provided that such motion be made at the same term or circuit at which the trial was had. When such motion is made and heard on the day of the trial, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be made up in the usual manner."

A bill of exceptions, properly speaking, always relates to some question of law. The act of Congress which authorized the court before which the trial was had to grant a new trial when the court becomes satisfied that an error in law was committed to which exceptions were taken at the time. And this it could do under the common law. But a verdict rendered on insufficient evidence, or for excessive damages, is the error of the jury as to fact, and whether erroneous for either of these causes, is a question which can be judged of only from the evidence. It is not the province, therefore, for an appellate court, unless it have all the evidence before it, to say whether the verdict was sustained by the evidence or not. Even were all the evidence given at the trial put in writing and sent up with the record, the appellate court could not determine the question. For that would be to invade the province of the jury in finding what facts have been proved by the evidence. *Ad questionem facti non respondent iudices, ad questionem legis non respondent juratores.* But if a case is settled by agreement of the parties stating, not the evidence, but facts admitted on both sides to be established by the evidence, the appellate court could as well decide

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the motion for a new trial as any other question of law, for trial arises out of the facts. Where the act of Congress, therefore, says that when a motion for a new trial has been made and heard upon the minutes of the court below, to set aside a verdict, or grant a new trial on exceptions, or for insufficient evidence, or excessive damages, and, on an appeal from the decision made on a bill of exceptions, or case, shall be settled in the usual manner, it intends that the questions of law involved in the bill of exceptions shall be taken up in that shape; and that the motion for a new trial, for insufficient evidence, or for excessive damages, must be granted upon an agreed case.

We have dwelt upon this point at some length, for the reason that the act of Congress on the subject is not expressed with the clearness that one would desire, and because different views have been entertained as to its construction. The facts established by the evidence in the present case, not having been stated by counsel, we think we have no proper means furnished from which to judge whether the verdict, in this instance, was excessive or otherwise.

After the evidence on both sides was closed, several prayers were presented to the court by the defendant, and one only by the plaintiff. The plaintiff's prayer was granted, and some of the defendant's were granted, and others refused. We do not deem it necessary, however, to examine the rulings of the court in answer to these several propositions of law in their order, since we are of opinion that a new trial ought to be granted, for we consider an erroneous instruction contained in the charge, the substance of which seems to pervade all the instructions at which exceptions were taken by the defendant. That part of the charge to which we refer more particularly is in these words: "We hold, if the proclamation of arrival at Washington was made, it is to be presumed it was made by an employee of the company unless the contrary is shown, and if made by other sources than the authority of the company, that it should have been countermanded by the company." The same idea pervades, and is much enlarged upon, in a subsequent part of the charge, from which we make one further extract, as follows: "And if the proclamation came either from the mouth of their agent (the company's) or from an unauthorized, but was uncontradicted through their agency, un-

the company would be derelict in its duty, and charge-
the consequences."

law, as thus relied upon by the court, exception was taken
ne by the defendant's counsel. The court by these rul-
away from the jury even the question of contributory
ce on the part of the deceased. Under circumstances very
o those of this case, the Court of Exchequer Chambers,
es *v. The North London Railway Company*, 6 L. R.
7 (1), ruled that it was the duty of the court to instruct
as matter of law, that plaintiff was not entitled to
The facts of that case, as they are correctly set out in
d-notes of the report, were as follows: In an action
he defendant by the executrix of B. to recover damages
death, alleged to have been caused by the defendant's
ce, the following evidence was given on behalf of the
B. was a passenger by the defendant's railway from
to Highbury. He was a season-ticket holder, and
to and fro every day; he was very shortsighted. The
sisted of six carriages. B. rode in the middle compart-
the last carriage. On approaching Highbury station
ondon, the railway passes through a tunnel. At the
nd of the station is a broad platform far exceeding the
f the train; then a narrow platform, about 12 feet of
within the tunnel; then a slope of 10 feet from the
to the level of the rails, and beyond this a heap of hard
extending some way into the tunnel, about a foot lower
platform. The train stopped at the station, the last two
being still in the tunnel, and the carriage in which B.
g opposite the heap. A passenger who rode in the next
as the train stopped, heard "Highbury" called out at
nd of the platform. He got out, and then heard a groan
nel, and on going back he found B. lying on the heap
legs between the wheels of the carriage, but they had
d over him. The passenger also heard "Keep your
lled out, and the train then moved forward toward the
One of B.'s legs was broken and he had received in-
uries, of which he died; it was after dark. There was

the facts of this case on p. 41, n. 1, *ante*.

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a lamp within the tunnel, near the entrance, about 28 feet where B. was found; the tunnel was full of steam. The judge nonsuited the plaintiff, giving her leave to move to enter a verdict, "if the court considered there was any evidence of negligence on the part of the defendants which could properly be put to the jury." The Court of Queen's Bench refused a rule. On appeal to the Exchequer Chamber, it was held by four of the judges that there was not evidence on which a jury could properly have found for the plaintiff, and the nonsuit was therefore right. The same judges held that the question of whether there was contributory negligence on the part of the decedent was still open on the above reservation. Three of the judges held *contra* on both points. By the whole court, that the calling out the name of the station is not in itself an invitation to the passengers to alight; whether it is so or not must depend on the circumstances of each particular case.

In the case just cited, the train had arrived at its destination, but the carriage in which was the passenger had not come up to the platform and stopped. It was a dark night, and the passenger in question was nearsighted. Proclamation was made by some one at the far end of the carriage, "Highbury." It did not appear by whom this proclamation was made, but it was not contradicted, and was probably uttered by some agent of the company. Thereupon the passenger in question left his seat and proceeded to alight. He fell upon a heap of rubbish, with his legs in front of one of the wheels. Another proclamation was then made to the passengers in the train, "Keep your seats," and the train moved forward, crushing the man's legs and inflicting other injuries, of which he subsequently died. Four of the seven judges of the Court of Exchequer Chamber held that the decision of the court below directing the plaintiff to be nonsuited, with so much as leaving the question of negligence to the jury, was correct; and all seven of them held that the calling out the name of the station was not in itself an invitation to the passenger to alight. In this case all the authorities previously decided in England, bearing upon the question, were cited; the cause was fully argued, and the judges all gave their opinions *seriatim*.

We all know, from our own experience, that it is customary for conductors to announce the name of a station to the passen-

The platform has been actually reached, so that they may be able to gather up their *impedimenta*, put on their overcoats, and in other respects prepare to alight. We know, however, how often it happens that in approaching the station, especially in a city, the trains stop for a brief period before reaching the landing or depot. The shifting of trains from one track to another, or other causes produced by the necessities of business in a large city, where it is important that the public highway should be obstructed as little as possible by the business of the carriers, render such stoppages inevitable. Men who travel are expected to be reasonable beings, and to exercise ordinary care for the safety of their own persons, and yet wherever men are transported, whether at home or abroad, accidents do happen to some extent, which are the direct results of their own imprudence. In such cases it would not be just to require others to make them compensation in damages. If men are to be transported as freight on railroads, highways and rivers, and their carriers held to the responsibility of insurers, they should suffer themselves to be handled as they may, and wait in their seats till they can be landed upon the ground by the agents of the transporters. Where intelligence and care are however, there must be accountability to itself at least, for the consequences of its own imprudence. While we hold that railroads and companies should be held to the full measure of their responsibility, yet it must be admitted that their business is of incalculable advantage to the public. They should be made to suffer, however, for their own negligence or mismanagement, where it is their fault, but it is the duty of courts to hold the scales of justice even in the trial of their causes, where juries are so liable to be led away by prejudice against them, or by sympathy and favor for the private citizen.

MR. CH. J., dissenting.

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HARMON v. WASHINGTON & GEORGETOWN RAILROAD COMPANY. (1)

Supreme Court, District of Columbia, July, 1887.

[Reported in 6 Mackey (17 D. C.) 57.]

STEPPING FROM STREET CAR IN MOTION—WHEN NEGLIGENCE.—In an action for injuries caused by falling from a street car, if it appears that when the plaintiff signaled the conductor to stop the car, the conductor rang the bell and the car immediately began to slow down and that plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion, and was injured, he cannot recover, and a refusal to so charge is error.

MOTION by defendant for new trial on bills of exception.

Action to recover damages for a personal injury alleged to have been caused by the negligence of defendant company. The facts appear in the opinion.

LUTHER H. PIKE, for plaintiff, cited: *R.R. Co. v. Stout*, 11 Wall. 657; *R.R. Co. v. Gladmon*, 15 Wall. 401; *Ind. etc. R.R. Co. v. Horst*, 93 U. S. 291; *Continental Impr. Co. v. Stead*, 10 U. S. 162; *R. Co. v. Whitton*, 13 Wall. 270; *Fleck v. Union R.R. Co.*, 134 Mass. 480; *Transp. Co. v. Downer*, 11 Wall. 134; *L. R. Co. v. Cooper*, 7 Wall. 571; *West Phila. P. R. Co. v. Gallagher*, 10 Pa. 524; *Germantown P. R. Co. v. Walling*, 97 Pa. 55; *Nola & N. R.R. v. Brooklyn City, etc. R.R. Co.*, 87 N. Y. 63; *Cumb. Val. R.R. Co. v. Mangans*, 61 Md. 53; *U. S. v. Laub*, 12 Pet. 4; *Chesapeake & D. Canal Co. v. Knapp*, 9 Pet. 467; *R.R. Co. v. Pollard*, 22 Wall. 389; *Carver v. Jackson*, 4 Pet. 80; *Nudd v. Burrows*, 91 U. S. 483; *Tracy v. Swartwout*, 10 Pet. 95; *Maginac v. Thompson*, 7 Wall. 389; *R.R. Co. v. Varnell*, 98 U. S. 479, 483.

ENOCH TOTTEN, for defendant, cited: *Secor v. Toledo, etc. R.R.*, 10 Fed. Rep. 15; *Hickey v. Boston, etc. R.R. Co.*, 14 Al. 429; *Jewell v. Chic. etc. R.*, 6 A. & E. R.R. Cas. 379; *Ohio, etc. R. v. Stratton*, 78 Ill. 88; *Wills v. Lynn, etc. R.R. Co.*, 129 M. 351; *Balt. etc. R.R. Co. v. Wilkinson*, 30 Md. 225.

James, J.—This is an action to recover damages for injury alleged to have been caused by the negligence of the defendant in failing safely to land and deliver the plaintiff as a passenger.

1. See the case next reported and note thereto on p. 302, *post*.

It appears that the plaintiff boarded one of the defendants on Pennsylvania Avenue, to ride to Nineteenth Street. That happened at his stopping place there was, of course, a lack of evidence.

As to the part of the plaintiff there was evidence tending to show that when he approached Nineteenth Street he signaled the conductor to stop the car to stop, and that the conductor thereupon rang the bell and the motion of the car began to slack, and that he went out of the car, and that the platform was crowded with passengers; that there were at least eight or ten passengers on the platform, and two, a man and a boy, were standing on the step of the car against the rails, the boy standing next the body of the car and the man standing on the other end of the step next the railing at the rear end of said car; that he crowded through the crowd on the platform, and stepped down on the street while the car was still in motion, but moving very slowly; that he was unable to get hold of either of the railings, because the man and boy were so standing on the step, and that after he had been waiting for the car to stop the conductor rang the bell, and the car suddenly started forward, and there was a sudden jerk that threw him off upon the street; that at the time the conductor signaled the conductor to stop, the latter was engaged in settling up his accounts, and was standing with his back to the car, leaning against the jamb, and after ringing the bell to stop remained standing inside the car and did not go out to assist the plaintiff off the platform or step, and that while plaintiff was on the lower step of the car the conductor rang the bell to start the car inside and the car started forward with a jerk and threw

the plaintiff himself further testified that this was about 9 o'clock at night; that he was in the habit of riding home on this car and sometimes with this same conductor; that on this occasion the car was so full that he could not easily get through the crowd in the time the conductor gave him, but he finally got down on the lower step, crowding his way between a man and a boy who were on that step, and was prevented from getting hold of the railing to support himself by reason of their positions; that he was not in the habit of getting off a car while it was in motion and did not do so on this occasion, but was jerked off by

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the sudden jerking forward of the car while he was waiting for it to come to a full stop; and finally, that there were more than a dozen passengers inside the car.

On the part of the defendant there was evidence tending to show that only thirty-five passengers rode on that car at any one time between the Navy Yard and Georgetown; that these got on and off from time to time; that a majority of them got off at the corner of Fifteenth Street and New York Avenue; that only five or six were inside the car at the time of the accident; that the plaintiff was in the habit of riding on defendant's cars and landing at Nineteenth Street, and in the habit of getting off while the car was in motion; that, at the time in question, the plaintiff signaled the conductor to stop; that the conductor rang the bell and the car began to slow down; that the conductor was standing on the rear platform when so signaled, and that when the bell was rung no other person was standing there except a small boy; that the plaintiff, after signaling, and without waiting for the car to stop, immediately went onto the platform and stepped down on the step, and, while the car was yet in motion, almost at a stand, stepped off onto the street, and then fell. The conductor himself speaks, we suppose, when the record asks, "That the conductor, while the plaintiff passed out onto the platform, had hold of the bell rope, and was watching the plaintiff, and as soon as the plaintiff alighted upon the street and was away from the car, the conductor pulled the strap and the bell for the driver to start; but seeing the plaintiff fall, the conductor immediately rung the bell and the car stopped before proceeding to its length."

As to the capacity of this car, there was evidence that there were seats inside for twenty-two persons.

Although this cause is not before us on a case stated, we have found it necessary to state at some length the testimony set out in the bills of exception, in order to consider the relevancy and effect of the instructions to the jury to which exceptions were taken.

The following instruction, given at the instance of the plaintiff, is the first point of objection by the defendant:

"3. If the jury believe from all the evidence that the plaintiff requested the conductor of the car, on which he was a passenger, to let him out at or near Nineteenth Street, on Pennsylvania

in the city of Washington, and thereupon the conductor rang the bell while inside the car, and remained there in a position where he could not ascertain whether the plaintiff had descended safely from the car or not, and rang the bell to start the plaintiff had alighted from it, and the plaintiff was jostled therefrom while attempting to get off, by the movement of the car, and thereby injured, the defendant is responsible for his injuries, and the plaintiff is entitled to recover damages." *See* *Adams v. Lumber Co.*

The court rejected that this instruction assumes as a fact that the conductor, if he did ring the bell inside the car, and remain there, was one which prevented him from seeing whether the plaintiff had descended safely from the car, when he rang the bell for starting. Such a fact is so important that it is material that it should not in any degree be taken from the jury. We are of opinion that the instruction is not objectionable.

The only exception is to the following instruction:

"It was the duty of the conductor to see that the car was not overcrowded, either inside or on the platform, as to impede or interfere with the departure in safety of passengers from it; and if the car was so crowded it was the duty of the conductor to allow time for the plaintiff to get off in safety, and to await his descent from it to the ground before giving the driver the signal for starting the car; and if he neglected or failed to do so, it was negligence on his part for which the defendant is responsible, provided, as a consequence of such failure or neglect, it existed, the plaintiff received the injuries of which he complains in his declaration."

On appeal from the charge to the jury the court added the following comment to this instruction, to which, also, exception was taken: "We perceive that to be correct law. A party taking his seat in these cars is entitled to have such use of his seat, and of the car, upon leaving the car, as will enable him to do so in safety, and if the car is overcrowded inside, so that he is delayed in getting off, and is unable to get off in safety, or if there is a crowd on the platform against the railing of the car, in consequence of either of these circumstances he is unable to get off in safety, then that would constitute a case of negli-

gence on the part of the conductor, for which the defendant would be responsible. It is perfectly absurd for them to content themselves with sticking up notices that the cars are not to be crowded, and then allow them to be overcrowded."

We think that the inevitable effect of the original instruction, and, still more, of the comments by which it was enforced, was present to the jury, as a matter which demanded their consideration, and which they might find to be a cause of the injury by overcrowding inside of the car, which had the effect to delay a passenger a long time in getting off, so that he was unable to get off in safety. There does not appear to have been any evidence at all from which the jury could have a right to conclude that there was overcrowding inside, nor was there anything to intimate that this number constituted overcrowding, or that it in any way affected his movements. The very fact that such overcrowding inside of these cars would constitute an outrage upon the rights of the public which could only excite the indignation of a jury would cause an assumption that it had occurred in the case at bar to have some effect upon their minds. The ordinary rule is that hypotheses which are not supported by any evidence are not to be submitted to the consideration of a jury, as the basis of a conclusion in arriving at a verdict, becomes all the more important when the hypothesis is of conduct so utterly inexcusable.

The most important exception, however, was to the refusal of the court to give the following instruction asked for by the defendant:

"7. If the jury shall be satisfied from the evidence that when the plaintiff signaled to the conductor to stop the car the conductor rang the bell for that purpose, and the car immediately began to slow down its speed, and that the plaintiff, without waiting for the car to stop, undertook to and did step from the car while it was still in motion, and was injured, he cannot recover, and the defendant is entitled to a verdict."

The situation submitted by this prayer was, that the plaintiff had signaled the conductor to stop the car, and that the conductor had rung the bell for the purpose of stopping, and that the car was slowing down in execution of that purpose. The case supposed was, in short, that the defendant was actually complying with its duty of stopping for the passenger to get off,

while the defendant was thus performing its duty (in other words, was not in fault) the plaintiff elected to get off without waiting for the completion of the defendant's duty.

The case presented would be one in which the defendant had not been guilty of any negligence. In such a case it would be irrelevant to inquire whether the plaintiff's own conduct contributed to negligence, and was thereby a contributory cause of injury. It would be enough that, if the case existed as supposed, the defendant's acts would not be the cause at all of the injury supposed.

The effect of the rejection of this prayer is rendered the more apparent by the fifth instruction actually given, at the instance of the plaintiff, in the following words:

"The jury believe from all the evidence that the car on which the plaintiff was a passenger had not entirely stopped when he stepped on the lower step, or nearly so, and that it was moving very slowly, the getting off of the plaintiff at that time being of itself relieve the company of the responsibility, and it is for the jury to consider and determine, in view of all the circumstances, whether it was negligence on the part of the plaintiff to attempt to get off before the car had entirely stopped, and while it was moving at reduced speed and slowly, if it was."

The instruction contains an assumption that the defendant had some duty for which it was responsible—in other words, had some duty; and the particular implication seems to be that the car was merely slowing up, and was not in process of stopping in order that the plaintiff might alight safely. The question whether the defendant's act involved an assumption of care—in other words, whether the defendant was committed to a full stop, should have been submitted to the jury, before the plaintiff should be allowed to consider whether the plaintiff's conduct in getting off while the car was in motion was contributory negligence. To put the latter question as it was here put involved an assumption that there was already negligence on the other side. For these reasons judgment is reversed and the cause is remanded for a new trial.

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HARMON v. THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY. (1)

Supreme Court, District of Columbia, June, 1889.

[Reported in 18 D. C. 255.]

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.—In an action to recover for injuries received by reason of the alleged negligence of the defendant, the burden is upon the latter to prove contributory negligence on the part of the plaintiff where the defense is contributory negligence; and in establishing such defense the defendant is not confined to the testimony offered in his own behalf, but may adopt such testimony as tends to show contributory negligence.

THE SAME—INSTRUCTIONS.—An instruction which leaves the question of contributory negligence to the jury without any guidance giving them any rule for determining when a plaintiff's negligence should be regarded as contributory, is erroneous and should not be granted.

THE SAME—RULING MUST BE UPON UNDISPUTED FACTS.—The court should not rule as a matter of law that the plaintiff has been guilty of contributory negligence, except where the facts on which such a ruling must rest are undisputed.

THE SAME—MUST RELATE TO THE INJURY.—Contributory negligence cannot be attributed to the plaintiff, merely because he was negligently guilty of an act which exposed him to a possible danger, having no relation to the accident which actually occurred.

STREET CARS MUST STOP TO ALLOW PASSENGERS TO ALIGHT.—A passenger upon a street car has a legal right that the car shall not merely slow up, but shall actually stop in order to allow him to alight, and he has a right to assume that this will be done; if, therefore, a passenger, for the purpose of alighting, gets upon the car step while the car is slowing, but instead of stopping, it suddenly starts again with a jerk, by reason of which the passenger is thrown from the car and injured, he is not to be charged with contributory negligence by being upon the step while the car was in motion, for he had a right to anticipate that the car would stop, and there was, in contemplation of law, no risk that the car would start again, either with a sudden jerk or otherwise, until he had alighted.

1. Cited in *Met. R.R. Co. v. Jones*, 1 App. Cas. D. C. 200, 2 Am. Neg. Cas. 334.

See the preceding case for the report of the proceedings on defendant's motion for a new trial.

The defendant company sued for a writ of error to the Supreme Court of the United States, where the judgment was affirmed upon condition. See 147 U. S. 571.

by plaintiff for a new trial on a bill of exceptions in an damages. The facts appear in the opinion.

MIKE and C. C. COLE, for plaintiff.

DAVIDGE, for defendant.

J. — This is an action for injuries sustained by reason of defendant's negligence in causing the plaintiff to fall from defendant's cars. The plaintiff testified, in his own behalf, that on the morning of the 28th of April, 1882, at about 9 o'clock, he was riding in one of defendant's cars on Pennsylvania Avenue near his home on Nineteenth Street; that he took his seat about two-thirds of the distance from the rear platform; that at the corner of Nineteenth Street he signaled to the conductor to let him get off, the conductor was then inside the car figuring up his fare under the light; that upon receiving the signal, the conductor rang the bell and the car began to slow up, and as he supposed about stopping; that there were not many passengers on the platform was crowded; that he made his way through the crowd on the platform and down onto the step which was occupied by a man and a boy, who held onto the railings on the platform of the step; that the car was, at that time, almost at a standstill; that he could neither swing off nor get back; that just as he had gotten on the step the bell was rung and the car started, and he was thereby thrown off onto the pavement and injured. The plaintiff stated that the conductor did not go out onto the platform to assist him to get off. On cross-examination he said that at the time of his attempting to get off, there were only six passengers inside of the car, while the platform was crowded, and that the man and boy referred to had to stand upon

the rear part of the defendant the conductor testified that the plaintiff was in the habit of riding on defendant's cars and of getting off while the car was in motion; that when the plaintiff signaled to get off the night in question he, the conductor, rang the bell and the car began to slow; that he was then standing on the rear platform; that he and the small boy were the only persons then on the platform; that the plaintiff, "without waiting for the car to stop, signaled the conductor, immediately went out on the platform and stepped down upon the step, at the same time he stepped onto the iron railing on the car, and while the car was

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defendant, by adopting what comes from the plaintiff's witness and by what he produced himself, has a preponderance of evidence to the effect that the plaintiff had contributed to his injury by his own negligence. But it is not worth while to dwell on the grounds of this rule; the question has been absolutely settled and closed by superior authority.

The defendant next complains that the court refused the following instructions: "There is evidence in this cause from which the jury may infer contributory negligence on the part of the plaintiff, and if the jury find the same, the plaintiff is not entitled to recover."

We think it would not have been proper to treat that question in that way. Such an instruction would contain the very thing which the exceptant imputes to the first instruction given at the instance of the plaintiff. It leaves the question of contributory negligence to the jury without any guidance, or giving them any rule for determining when a plaintiff's negligence is to be regarded as contributory. It points out nothing for their consideration, and could only have effect as an indefinite and misleading intimation that there was evidence of contributory negligence. On the other hand, the court covered the same ground in its charge to the jury. The trial justice there said: "If the plaintiff undertook, by requesting the conductor to stop the car, to descend from the car while it was still in motion, however slowly it might be going, that is an act involving necessarily some imprudence; so I take it; and if that act was the cause of his *falling*, it would amount, in my judgment, to contributory negligence, and would defeat his action." This part of the charge gave the defendant more than he asked for in his rejected prayer. If this instruction, however, had not been given in the charge, the prayer would still have been properly refused. It was substantially wrong and was also misleading and a detached proposition.

The next exception argued by the defendant is, that the court erred in refusing to rule that the plaintiff *in law* contributed to the injury. The facts on which such an instruction must rest were themselves in dispute. The court could so instruct only upon an undisputed basis.

The remaining exceptions are to the charge. The court began by stating that the case suggested four theories as to the cause

accident complained of, and then stated these theories as follows:

"In the first place, the testimony on the part of the defendant is to the effect that the plaintiff *had descended from the car in safety*, and that he stepped and fell from some cause not attributable to the conduct of the defendant, but from some unforeseen accident. If you find that to be the case, it is perfectly apparent there is no ground of action at all."

"If the plaintiff undertook, after requesting the conductor to *the car, to descend from the car while it was still in motion*, whether slowly it might be going, that is an act involving necessary imprudence; so I take it; *and if that act was the cause of his falling* it would amount, in my judgment, to contributory negligence, and would defeat his action."

If you were satisfied that it was an act of carelessness on the part of the plaintiff to come out on the crowded platform *and step down on the car while it was already occupied by other people, so that he had no means of supporting himself, and the consequence of that alone he fell from the car, without any other cause*, I say, if you are satisfied that that was an act of carelessness on the part of the plaintiff, and that it was the direct cause of his falling from the car, that would also amount to contributory negligence, and would defeat his right to recover."

If you are satisfied that while he was upon the step, even if it might have been imprudent in him to go there, and if the conductor had allowed the car to stop, he would have been in safety and no accident would have happened, but that, by not so doing the conductor, *either negligently failed to stop the car whether or not he had alighted, or, seeing him there, neglected to wait until he had alighted, and gave the signal to go on, the consequence of that a sudden jerk of the car took place, and threw him down and was the immediate cause of his falling*, that the accident would not have happened but for that fact, I would hold that the company is responsible."

So much of the charge as was stated under the first, third and fourth of these theories or conditions of the evidence, the plaintiff excepted.

He did not perceive any ground for his exception to the first and third. It was wholly in his favor. His exception to the third

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seems to be taken on the ground that the hypothesis contained in the instruction showed contributory negligence in law, and that, therefore, the question of contributory negligence should not have been left to the jury at all. We are of opinion that this hypothesis involved questions of fact which the court had no right to decide, and that the whole question of negligence, and of the actual cause of the accident, was properly and necessarily left to the jury.

At the argument, however, the defendant's most serious objection was to the charge of the court upon the fourth hypothesis, which was a theory of the evidence. For the sake of clearness, we will state this part of the charge: "If you are satisfied that while the plaintiff (plaintiff) was upon the step, even though it might have been imprudent in him to go there, and yet, if the conductor had allowed the car to stop, he would have alighted in safety, and no accident would have happened, but that, instead of so doing, the conductor *either negligently failed to observe* whether or not the plaintiff had alighted, or, seeing him there, neglected to wait until he had alighted, and gave the signal to go on, and in consequence of that a sudden jerk of the car took place, and that that threw the plaintiff down and was the immediate cause of his falling, and that no accident would not have happened but for that fact, then I find that the company is responsible."

This presents for consideration the doctrine of proximate and effective cause in cases of injury.

In any such case the facts may show that the plaintiff himself hurt himself, or that he helped to hurt himself, while the defendant also hurt him; or they may show that, although the plaintiff had been guilty of some negligence, he cannot be said to have thereby hurt himself or to have helped to hurt himself, and that it was really the defendant who caused the injury. In the first and second conditions of fact the plaintiff cannot recover; in the last he can.

By the instruction just recited the court undertook to give the jury a rule for determining whether the plaintiff should be held to have helped to hurt himself, or whether, in spite of his antecedent imprudence in being on the step, the real *cause* of his being hurt was the act of the defendant. Was this rule correctly given? In order to determine the effect of an instruction of this kind it is sometimes convenient to recast it.

The jury were substantially told that, even if they should find it was imprudent in the plaintiff to step down onto the step when the car had stopped, yet if they were satisfied that no harm would have come of his doing so if the conductor had allowed the car to stop, and were satisfied that, instead of allowing it to stop, the conductor gave a signal to go on, and that in consequence of this sudden jerk caused the plaintiff to fall off the step, and in giving this signal and thus causing the jerk the conductor was negligent, either *by reason of failing to observe*, before he knew whether or not the plaintiff had alighted, or by reason of not waiting till the plaintiff had alighted after seeing that he had not done so—then they should find that the defendant's negligence was the cause of the injury.

The defendant's printed argument says of this instruction: "The court erred in ruling that if the jury found that the plaintiff was, in fact, guilty of contributory negligence in descending the steps under the circumstances, he could still recover if the conductor either negligently failed to see him there or saw him and then started the car and thereby threw him off." And the plaintiff argued that the authorities allow a recovery by one who has himself been negligent in those cases only where the defendant had actually discovered the plaintiff's resulting danger at the time, after so discovering it, to counteract it and failed to do so, thus losing an opportunity.

In this mode of stating the court's ruling, it is to be observed, that it misconstrues the instruction. The jury were *not* told that if the plaintiff "was, in fact, guilty of contributory negligence," he might still recover on the conditions supposed. On the contrary, they were plainly made to understand that they were to determine whether the plaintiff's negligence was *concurrent* and they were further told, in effect, that it was not to be considered as contributory if they found that it was after all the defendant's negligence which rendered fatal what would otherwise have been harmless. And then, for the purpose of applying this instruction to the true cause of the injury, the jury were authorized by the instruction to treat a *failure to observe* whether a passenger, when he alighted, was safely off the car before it was started again as negligence, which was the proximate cause; in other words, the cause of the injury.

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It is proper, however, to consider the aspects of the case as presented by the defendant. It was insisted at the argument that placing himself upon the step of the car, the plaintiff was guilty of a negligence which exposed him to the injury which befell him; that such negligence must be considered to be a contributory cause of that injury, unless it is shown that the defendant *was aware of plaintiff's danger*, and was by such knowledge charged with a duty to avert its consequences, and that he neglected that duty. It was admitted that in such a case the negligence of the defendant in not counteracting a peril which he saw, would be the proximate cause, and, therefore, in law, the cause of the injury; but it was claimed that where the defendant was only negligent in not seeing that the plaintiff was in danger, the case was similar to one of two similar and co-operative negligences, and that the defendant's negligence could not then be treated as the cause of the injury. In support of this proposition the defendant referred to cases in which the injury happened when the plaintiff and defendant were using the same highway, and it was claimed that the principle established by those authorities is that where the plaintiff has been guilty of negligence, the defendant cannot be held liable, unless it is shown that he had actual knowledge of the plaintiff's condition of peril, and was *then* negligent of his duty to try to avoid the injury.

It is unnecessary to consider in this case whether, in the class of cases referred to, a defendant's *negligent omission to act*, if that he had the opportunity to render the plaintiff's negligence harmless should have the same effect to charge him as the negligence proximate cause of the injury, which his omission of duty in that respect, after actually seeing that he had that opportunity, is admitted to have. The question which we have to determine is, what is the effect of a passenger-carrier's *omission to act*, whether a passenger, whom he is setting down, has actually alighted; and this question is governed by the law of this particular business.

It is to be remembered that, by the hypothesis of the injury now under consideration, the matter in hand was *the defendant's negligence* of a passenger; that the car had slowed in order that he might alight; that the passenger was on the platform step for the purpose of alighting and that his carrier, without observing whether

was completed, started the car again, with a sudden jerk, threw him off.

The omission in such a case was not, as in the cases to, an omission to observe that a person had placed himself in danger of being hurt by him, whereby he himself was called upon to exercise care to avert that consequence; it was not as dangerous a position, that the fact of his passenger's being on the platform step was to be observed by him, but as a fact raising the question whether his passenger's delivery had yet been completed by his alighting. It was part of his own employment to observe whether an alighting passenger had actually got off before he should start his car again. The legal aspect of the omission was that it was a failure to observe whether he had completed his own work of delivering his passenger; and if he had not attended to that duty, and did not give his passenger time to get off before he started again, it was necessarily this neglect of a common carrier's duty that did the mischief. The duty spoken of in the authorities referred to by the defendant is based upon a wholly different principle. In those cases the duty is owed to a person solely because he was in danger of being hurt; in this case the duty was owed to one whom the defendant had undertaken to deliver, and who was to be allowed by the defendant to alight without any interruption of his alighting. The plaintiff's "imprudence" in being on the platform was dwelt upon by the defendant as an act of negligence. As adverted to in the court's instruction, it is proper to consider the legal aspect of that act, and especially whether it possibly be regarded as a negligence, *contributory to his being thrown off by the starting again of the car.*

The essential element of all the cases in which the plaintiff was held guilty of contributory negligence by being in the wrong was that he thereby put himself in the way of precisely what was to happen to him, and his doing so was negligence just because he disregarded that risk. For example, when a person walks across a railway track, his doing so is held to be negligence because he incurred the risk of the very injury that befell him. It is proper to consider whether he thereby exposed himself to a certain kind of mishap. Negligent exposure of that kind is held to be contributory to the mishap that did occur; and so

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here. It is irrelevant to the defendant's exception that the plaintiff may, by going onto the platform step before the car starts, have put himself at the risk of *falling* off by reason of the motion of the car, since that could not be contributory to being jerked off by the conductor's starting again. The question is whether he exposed himself to this last peril and thereby contributed to the injury which actually happened. Now, the hypothesis of the charge is that the plaintiff, being a passenger carried by a common carrier of passengers, had demanded a page of the car in order that he might alight. He had a right that the car should not merely slow up but actually stop for that purpose, and there was, *in contemplation of law*, no risk that it would start again, either with sudden jerk or otherwise, if he should have alighted. Nothing was to be anticipated by him but a complete performance of the carrier's duty. It was of course a matter of course, because it was a part of the law of a carrier carrying that no sudden starting should interrupt the passenger of his alighting. Even if it be true that he put himself in peril of falling before the car came to a standstill, he cannot be said to have put himself in peril of being in this way jerked off and to have contributed to his being jerked off by the conductor. On the other hand, it does not lie in the mouth of the carrier to say that the passenger made it easy for him to be jerked off by the starting of the car, which constituted a violation of the carrier's duty to that passenger.

On the hypothesis of the charge, then, no case of two *contributory* negligences can arise. The negligence of the conductor in failing to observe whether his passenger had alighted before starting caused the car to start again, thereby throwing him off, and that necessarily be the cause of the injury.

In conclusion, we deem it important to state again the duty of this class of carriers. It is the legal duty of the conductor of a street car to *stop* his car when a passenger is about to alight; it is his legal duty to observe a passenger who is alighting and to be sure that he has actually alighted, before he starts his car again; and if he hurts his passenger by any neglect of his duty, it is immaterial whether that neglect consisted of not observing whether he was his particular business to observe, or of not doing what it was his particular business to do after he had observed.

OHAN v. THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

[Reported in 19 D. C. 316.]

IN ATTEMPTING TO GET ON STREET CAR IN MOTION, IS IT THE DUTY OF CONDUCTOR TO WARN HIM OFF.—A passenger attempts to get on a street car while it is in motion and the conductor and driver, because of his being a cripple, doubt his ability to do so, they do not owe him a duty to warn him off, for he is the best judge of the danger of such an act, and the responsibility for it rests solely upon him.

RY WISE GARNETT and D. S. MACKALL, for plaintiff
e), cited: *Briggs v. Union St. R.R. Co.*, 148 Mass. 72;
erl *v. St. Paul City R.R. Co.*, 43 N. W. 837; *Denham v.*
Co., 73 Tex. 78; *Muller v. Dist. of Col.*, 5 Mackey, 286;
St. L. R.R. Co. *v. Horst*, 93 U. S. 291; *Gay v. Winter*,
153; *Shear. & Redf. Neg.* §§ 61, 99; *Davies v. Mann*,
s. & W. 546; *Spencer v. R.R. Co.*, 4 Mackey, 138.

paragraph 3 of note 1 to this case, p. 302, *ante*.

by the negligence of the Washington and Georgetown Railroad Company.

The declaration contains two counts. The first avers that plaintiff was a passenger on one of the defendant's cars on Seventh Street, and that on arriving at the junction of that street and Pennsylvania Avenue he obtained a transfer ticket and proceeded to a car standing at the junction bound east; that he was a cripple and having deposited his cane and umbrella on the seat, he took hold of the car with both hands to get in, and had partially gotten in, when, without negligence on his part, and by the negligence of the defendant, the car was started, and he was thrown violently to the ground and injured.

The second count is more general, and avers that he was about to take his seat upon one of the defendant's cars, when, without negligence on his part, and through the carelessness and negligence of the defendant, he was thrown violently to the ground and injured.

At the trial the plaintiff by himself alone offered evidence tending to prove the facts stated in the first count of the declaration.

The defendant, by its conductor and driver, and by one Fleming, a passenger, offered evidence tending to prove that the defendant's car had stopped at the junction of Seventh Street and Pennsylvania Avenue, and to the west of the Seventh Street tracks, and had let off and taken on passengers, and had started east upon the tracks of Pennsylvania Avenue, when the plaintiff, coming from the direction of the southwest corner of Seventh Street and Pennsylvania Avenue, hailed the car, which was then moving across the Seventh Street tracks; that the conductor pulled the bell, but the driver, mindful of the regulation prohibiting the stopping of a car on a crossing, proceeded at a very slow rate of speed, walking his horses across the Seventh Street tracks, and stopped a few feet to the east of those tracks; that the plaintiff did not wait for the car to stop, but, whilst it was in motion, he seized one of the uprights, it being an open or summer car, and by the motion of the car he was thrown down in the street; that the plaintiff was a cripple, having one wooden leg. The driver testified that he was gradually putting on the brakes, but when he saw the plaintiff take hold of the car, he put the brakes on and stopped within four or five feet.

passenger witness heard the plaintiff walking alongside of it, and saw he had hold of it, the car being east of the Sevier street tracks, and in motion, and he called the conductor's attention to him; the conductor promptly blew his whistle, and the car was stopped as soon as it could be. The plaintiff fell. The witness was turned to call the attention of the conductor. The car went fifteen or twenty feet beyond the plaintiff before it stopped.

In this state of the evidence the court refused several instructions which were prayed in behalf of the defendant; to which exceptions were duly taken. These exceptions were substantially rendered unimportant by the charge of the court, and need not be considered.

The principal exception covers a portion of the charge of the court to the jury, which is as follows:

Now, gentlemen, there is one exception to that rule, and that is, taking the case I have last instanced; if the driver of a vehicle saw the man, saw his exposed condition then, if he were careless, it would be the duty of the driver to use reasonable diligence to prevent any accident occurring. In this case, gentlemen, then, if you should be satisfied from the evidence that the plaintiff did undertake to board the car when it was in motion; if you reach that conclusion that he attempted to board this car while it was in motion, and if you should be satisfied that that was an imprudent thing to do and a careless thing to do, nevertheless, if the conductor and driver saw his peril, and after seeing and understanding his peril, did not make every reasonable effort to stop the car or avert it, they would be liable, notwithstanding the carelessness of the plaintiff. If they saw, by the evidence, that he was approaching a moving car, and was about to board it; if that was manifest, and they did nothing to warn him or to stop when they saw what he was about to do, and notwithstanding, understanding his peril, and knowing that he was in peril, notwithstanding that the plaintiff himself might have been negligent, that would not prevent his recovery. That, gentlemen, is the only exception to the general rule which I have referred to.

In this case, if the car had stopped—supposing that to be the case, I think I must advise you that it is competent for you, if

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you so esteem the facts to be, to so find if you so believe from the evidence—if the car had stopped and discharged its passengers and received its other passengers and then started, and was under way the plaintiff attempted to board it, and if the conductor or driver saw that he was trying to board the car, or was about to try to board it, and did not do what they reasonably ought to have done to stop his attempt to get on or to stop the car as they saw his peril and understood it, then the defendant would be liable for the injury, notwithstanding that the plaintiff was careless.

"Now, in this connection I give you the prayer, which reads like this, and I advise you that is the law of this case: 'If the jury shall find from the evidence, that after the car had started eastward the plaintiff called to the conductor to stop the car, after the latter gave the necessary signal, and the car slowed, and that there was no negligence on the part of the defendant, but that the plaintiff, instead of waiting for the car to stop, voluntarily took hold of one of the posts, and undertook to get on whilst the car was in motion, then the plaintiff took the risk of the attempt to get on and is not entitled to recover, provided the defendant, after seeing the plaintiff in a position of danger, exercised reasonable diligence in guarding against the same.'"

The court had just stated that in cases of mutual negligence co-operating in the production of the injury, the general rule is that an action cannot be maintained.

These instructions by the court are addressed to a theory of the case that is entirely at variance with the theory of the plaintiff. The case attempted to be made out by the plaintiff was that the defendant carelessly and negligently started the car whilst he, without negligence on his part, was in the act of getting on. The evidence to which these instructions related was in behalf of the defendant, that the plaintiff, a cripple, with one wooden leg, without waiting for the car to stop, carelessly and negligently attempted to get aboard whilst it was in motion, and in so doing was thrown down. No evidence was offered or given tending to prove that the defendant was negligent in stopping the car when the plaintiff attempted to get on; on the contrary the evidence is that the defendant's servants stopped the car as soon as possible after learning that the plaintiff was making the

rule as to concurrent negligence and the exception thereto, stated in the case of *Northern Central v. State*, 31 Md. "If negligence be imputable to both parties in reference to injury, it must have been concurrent, and co-operated to produce the injury complained of. And in such case no action will lie; for it would be impossible to apportion the damages, or exactly ascertain how much each party contributed, by his negligence, to the production of the injury. It is true that, in such cases, there may be negligence in both parties concerned, and yet an action may be maintained; but in such cases it must appear, either that the defendant might by a proper degree of care have avoided the consequence of the injured party's negligence, or the latter could not, by ordinary care, have avoided the consequences of the defendant's negligence. This, however, requires time for the one party to become aware of the conduct of the other, or the situation of the other, for neither could be required to anticipate the other's negligence."

the case at bar, the instruction is that if the defendant's witnesses saw the plaintiff approaching a moving car and about to enter it, and they did nothing to warn him off, or if they did not do so when they saw what he was about to do, or was doing, understanding his peril, and the injury resulted, the plaintiff could recover. This is clearly erroneous for several reasons.

makes no distinction between the duty of the defendant to the plaintiff approaching the car and to the plaintiff having hold the car attempting to get on, but attributes peril and corresponding duty to both.

assumes that the defendant knew, or must have known from the mere act of the plaintiff in approaching the car, that he entered it for the purpose of getting upon it while it was in motion, and that he was therefore in peril. But the defendant could not be expected to anticipate the negligence of the plaintiff. Its servant had the right to assume under such circumstances that the plaintiff, being *sui juris*, and in possession of all his faculties,

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desired to stop the car, and intended not to get on the car while it was in motion, but to wait until it stopped.

Had they believed that he entertained the purpose of getting on the car, while it was in motion, and they doubted his ability so to do, they owed him no such duty as to warn him off, for he was the best judge of the risk or danger of such an act, and the responsibility for it rested solely upon him.

If such duty of warning existed, the failure to give it would not relieve the plaintiff of the necessity of taking care of himself or make the resulting injury any the less the proximate cause of his own act, for which an action would not lie.

Under conditions somewhat similar, in *R.R. Co. v. Housh*, 95 U. S., at p. 702, the court say: "The failure of the engineer to sound the whistle or ring the bell, if such were the facts, would not relieve the defendant from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. If she used her senses, she could not have failed to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others . . . No railroad company can be held for a failure of experiments of that kind. If a man chooses in such a position to take risks, he must bear the possible consequences of failure."

The instruction does not leave the question of peril in which he "was about to do or was doing" as a fact to be determined by the jury, but it assumes the peril as matter of law, and thereupon bases the duty.

The measure of the duty required is left entirely undefined. The jury are not enlightened or directed as to what the defendant reasonably should have done to avert the injury, and they are left wholly to conjecture and speculation. The existence of an undefined duty was suggested, and the probable result was that the jury were misled.

Upon the facts disclosed by the evidence to which these p

the charge related, there appeared to have been no ground
very by the plaintiff, and under these circumstances the
ould not have erred if it had excluded this theory of the
m the consideration of the jury.

instructions, however, assumed as established matters not
viz., actions on the part of the plaintiff in approaching
from which an intention to board the car while in motion
e inferred; that the plaintiff was in peril in so approach-
that the defendant's servants had time to become aware
ituation of the plaintiff, and to provide for it.

instruct a jury upon assumed facts to which no evidence
was error. Such instructions tended to mislead them by
wing their attention from the proper points involved in the
juries are sufficiently prone to indulge in conjecture with-
ing possible facts not in evidence suggested for their con-
on. In no respect could the instructions mentioned have
them in reaching a just conclusion." *Railroad Company v.*
n, 95 U. S. 703.

verdict is set aside, and a new trial granted.

S. V. BALTIMORE & OHIO RAILROAD CO.

Supreme Court, District of Columbia, December, 1892

[Reported in 21 D. C. 346.]

G FROM MOVING CAR NOT NEGLIGENCE.—The mere act
umping from a car in motion, not at a high speed, does not in itself
itute contributory negligence at law.

ENCE IN JUMPING FROM TRAIN, QUESTION FOR JURY.
ere it appeared that the plaintiff received instructions from
employees of a railroad company as to which was the desired train,
he boarded, and as it was moving was told by the conductor that
the wrong train and that he had better get off, and he did so and
jured, the court should not have granted a nonsuit.

ON OF EVIDENCE OF ABSENCE OF SIGNS IN STA-
, ERROR.—The exclusion of the testimony of the plaintiff that
were no signs within the station indicating the destination of the
ent trains, was error, as the evidence bore upon the question of
gligence of the company.

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HEARING upon a bill of exceptions taken by the plaintiff in his action for damages. Judgment reversed. The facts appear in the opinion.

FRANK T. BROWNING, for plaintiff (appellant).

MORRIS & HAMILTON, for defendant (appellee).

Hagner, J.—This case has had a troublous history. It was first tried in 1883, before Justice MacArthur, and a verdict of \$8,000 was rendered for the plaintiff, after a hearing of the evidence on both sides. On appeal this was reversed by the General Term, Chief Justice Cartter and Justices Wylie and James sitting, and the case was remanded to the Special Term in November of that year it came on for trial before Justice Merrick, who, upon the statement by plaintiff's counsel of what he expected to prove, directed the jury to render a verdict for the defendant, without hearing the plaintiff's testimony. On appeal, this ruling was reversed by the General Term, Chief Justice Cartter and Justices Cox and James sitting, and the case was again remanded for trial in May, 1886.

In December, 1887, it was again heard in the Special Term before Justice Cox, and upon a hearing of the testimony on both sides, a verdict for \$10,000 was rendered for the plaintiff. This was set aside by the presiding justice in January, 1888, and a new trial ordered. No appeal was taken from this ruling, and the case was commenced again in the Special Term, before Justice Merrick. After the evidence for the plaintiff was closed, the presiding justice directed a verdict to be entered for the defendant, and the present, the third appeal, was taken from that order.

The plaintiff sued to recover for damages sustained while alighting from a passenger train of the defendant company, through alleged negligence of its officers and servants. The facts required upon by the plaintiff, necessary to an understanding of his claim, may be thus abridged from the testimony in the record:

It appears he was a man thirty-eight years of age at the time of the accident, and was then engaged near Gaithersburg, Maryland, in the service of the railroad company; he came to Washington on the evening before the accident, and started back to his home next morning; he reached the depot shortly before six o'clock, and bought a ticket for Gaithersburg. As he went through the gate leading to the trains he received instructions from

per as to the location of the train he should take, and got smoking-car in that train, where he remained until an ee of the company, dressed in overalls, whom he supposed laborer, entered the car and told plaintiff that car had been d; plaintiff told him he wanted to go to Gaithersburg, and im where the train was, and he pointed it out on the right platform; he got aboard that train, just as it was moving after it had gone a short distance outside the depot, while still upon the platform, an official came out of the car, in the uniform of the company. The plaintiff testified he ed him to be the conductor, and asked him if that train ng to Gaithersburg. He replied: "No, it is going to Bal- and if you don't want to go to Baltimore you had better " "Acting under these instructions" (he thinking it was suppose), "I got off, with the result of breaking my arm ng on my elbow." When asked how the accident occurred, f says: "The best of my recollection is that as I stepped engineer gave the engine a little more steam, and threw my balance;" and that after the fall he remembers nothing. time of the accident the cars were going at the rate of a half or three miles an hour.

plaintiff was taken to Providence Hospital, where his arm putated.

cross-examination, he testified the party whom he took to conductor did not address him until he asked him if that is going to Gaithersburg; that he got off immediately, he did not know whether it was the very secohd or not; his time; he did not ask him to stop the car and let him the thought it was safe, and therefore got off; that the or thought so too; that he jumped from the right hand the car, as he believed, in the direction the train was that there was no embankment at the place he jumped train; that he had gotten off of moving trains before; not in the habit of doing so; and that he had been a gent for several years for a railroad company in Virginia; did not ask the conductor to stop the train, because he d the conductor thought it wasn't necessary to stop it, thought he could get off in safety without stopping; that ot see any peril in jumping off; there was no apparent

danger to him, and he thought it was safe, as the train was going slowly; that he got off because he didn't want to go to Baltimore, but wanted to go to Gaithersburg; that he understood that he would be taken to Baltimore if he did not get off then, because the conductor didn't stop; and the train continued in motion, and if he had stayed on he would have been carried to Baltimore, and if he had business at Gaithersburg.

In the progress of the examination several exceptions were taken by the plaintiff to rulings of the court upon points of law and evidence.

The remaining evidence in the case was that of Dr. Elliott, a surgeon who performed the operation, as to the serious character of the injury.

The plaintiff having closed his case, on motion of defendant's counsel, the court directed the jury to return a verdict for the defendant, to which ruling of the court the plaintiff by his counsel excepted.

It was contended by defendant's counsel that in the final stage of the case the court in General Term had made rulings which were fatal to the right of the plaintiff to recover in damages. We have been at pains to seek for such ruling in the opinion without success. The opinion of the General Term on the appeal from Justice MacArthur's rulings, said to have been delivered by Justice James, has disappeared from the papers. We have caused search to be made for it by the clerk without success, and as it was never printed, we have no information as to its terms. We can control us. On examination we find the reasons assigned for a new trial addressed to Justice MacArthur are in the familiar form—that the verdict was against the evidence, and the weight of evidence; that the damages were excessive; that the jury disregarded the court's instructions, and that the instructions were incorrect. No mention was made of the main point presented here.

On the second appeal the reported opinion of Chief Justice Cartter embodies no such statement; but in one of the concluding paragraphs the language of the court was rather to the contrary. The Chief Justice says: "We think that within the limitations of the case, as stated by counsel, a case might be made." Mackey, 14.

ntly, if the supposed rulings had been made by the Term at either trial, there would have been an end of the g since.

second exception was taken to the refusal of the court to question to be put to the plaintiff which it held should en asked in chief. This ruling cannot be considered here, a decision is a matter of discretion with the trial justice, ot the subject of review.

first and third exceptions present practically the same . It appears from the first exception that the plaintiff ed, "When you went to the depot that morning, what es, what means, were in the depot that would suggest to ers the train they were to take?" and from the third on, that the question asked of Mr. Tinker was, "State, if ase, the means passengers had of knowing what train to their different places of destination."

reason was assigned by the defendant why the testimony t admissible, and, under such circumstances, if it were ble for any purpose, it was error to exclude it. *Conner v. Vernon Co.*, 25 Md. 55.

ugh the point may appear of minor importance in the stage of the case, we consider it proper to say we think dence should have been admitted. The plaintiff had testi- had applied in turn to two employees of the company for tion as to the train he ought to take. If there had been ed in proper places in the depot legible signs indicating ination of the several trains, there would have been little, aps no excuse for his making the inquiry, or for his claim relied upon their statements; while proof of the absence proper appliances would tend to support the need of his s, and the probability of his reliance upon the replies he d. This fact he was entitled to present to the jury, as to show negligence on the part of the defendant. There n, doubtless, a decided improvement in these particulars in tations; but in the absence of such needful aids there be a more bewildering place to one unaccustomed to g than a great depot filled with different trains and l with passengers leaving and arriving. There should, of be officials enough present to give answers, not grudg-

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ingly or of necessity, to those needing information; but the presence of sign boards would be a very great help to those who have a right to be relieved of such anxiety in the shortest possible time."

The prominent question in the case is whether the action in withdrawing the case from the jury at the close of the plaintiff's testimony, was proper under the circumstances.

The power and right of a court to take such a course in a proper case cannot be questioned. The only inquiry before the court was whether that course was justified under the circumstances of the case at bar. The more recent statements of the rule by the courts appear to be couched in more careful terms than its earlier expositions, as if designed to confine its application within narrower limits; especially where the injury involves a question of contributory negligence.

Thus in *Mackey, adm'r, v. B. & P. R.R. Co.*, 19 D. C. 29, the court said: "The court was correct in its refusal to direct a verdict for the defendant at the close of the testimony on both sides. . . . There should be evidence adduced establishing contributory negligence on the part of the plaintiff, in relation to which reasonable minded men could not draw different inferences, to justify the court, under this defense, to withdraw the facts from the consideration of the jury."

So in 17 Wall. 661, *Railroad Company v. Stout*: "If upon the construction which the jury was authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion of negligence can be justified, the defendant is not entitled to this order."

The most recent enunciation of the rule by the Supreme Court of the United States is contained in the careful opinion of Justice Lamar, in *Grand Trunk R'y Co. v. Ives*, 144 U. S. 417, the court says: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surrounding

stances, be gross negligence. The policy of the law has been the determination of such questions to the jury, under instructions from the court. It is their province to note special circumstances and surroundings of each case, and then whether the conduct of the parties in that case was such as to be expected of reasonable, prudent men, under a similar set of facts. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men would draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." On the judge thus discusses another phase of the subject, and it is earnestly insisted that . . . as the evidence in the case given by the plaintiff's own witnesses shows that the deceased was so negligent in the premises that but for such contributory negligence on his part the accident would not have happened . . . the court below should, as a matter of law, have so ruled, and it not having done so, this court should so declare, and reverse its judgment. To this argument several answers might be given, but the main reason why it is unsound is this: as the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case and under proper instructions from the court, so, also, the question of whether there was negligence in the deceased which was the proximate cause of the injury was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or, perhaps, more accurately stated, the question of whether the deceased, at the time of the accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person under similar circumstances was no more a question of law for the court than was the question of negligence on the part of the defendant. There is no such an absolute standard of ordinary care and diligence in one instance than in the other." Finally, on p. 433, the justice considers an instruction which was refused by the court below: "The reason given by the court for refusing this

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request was that 'it is too much upon the weight of the evidence and confines the jury to the particular circumstances named without notice of others that they may think important.' The reason is a second one. In determining whether the deceased was guilty of contributory negligence, the jury were bound to consider all the facts and circumstances bearing upon that question and not select one particular prominent fact or circumstance controlling the case to the exclusion of all the others."

As no particular ground was assigned, either in the motion of the defendant, or in the order of the court for its action in the case before us, we may well assume the statement of defense counsel as correct, that the court gave the direction "on the ground that the facts relied on by the plaintiff and admitted to be true as stated, disclosed that want of ordinary care and caution on the part of the plaintiff which constitutes *contributory negligence* as a matter of law, and defeats a recovery." It is, therefore, the duty to decide whether the testimony, upon any construction, the jury was authorized to put upon it, or to draw from it, so established the plaintiff's contributory negligence that fairminded jurors could not draw a different inference from it, or, as stated in the case last referred to, "that all reasonable men must draw the same conclusion from it."

Without going back to the conversation on the platform with the car from which the plaintiff jumped, it was in proof to the jury that the plaintiff addressed himself soon after the train got away to a person who came out of the car to the platform and asked him whether that car was going to Gaithersburg. The plaintiff might well have made the inquiry, as he had received contradictory information from the two officials to whom he had previously spoken on the subject. He had what one of the cases states is a strong obligation to return to his work in Gaithersburg, and his absence might lose him his place. He received the reply and quoted: "No, it is going to Baltimore; if you don't want to go to Baltimore, you had better get off." The speaker was an employee of the railroad, in its uniform, whom the plaintiff, himself a railroad man, swears he took to be the conductor. There is no evidence to the contrary, and a remark of the defendant's counsel on cross-examination, in reply to the plaintiff's statement that the conductor, too, thought it was safe for him to get off—"

that he thought. He will be here to speak for himself"—to be a confession that such was his position. There have been as much evidence that he was the conductor as that the person from whom the plaintiff bought the ticket was the person who stood at the entrance gate, and the person who were engaged in the car plaintiff first entered, were employed. They were all acting as if they were employees of the company cannot speak for itself. It is impersonal, and they speak and act by agents, who, within the scope of their duties, can bind the company for their statements.

In *Ye v. Va. Mid. Ry. Co.*, 20 D. C. 63, this court affirmed the instruction given by the court below, that statements made by the conductor in Washington to a passenger purchasing a ticket, would go through on that ticket without change of cars, would bind the company; and the General Term went further in the trial justice, holding that it was the passenger's duty to rely on a statement made subsequently by the conductor at Charlottesville, that certain passengers must change cars at that place.

In *Baltimore & O. R.R. Co. v. Kane*, 69 Md. 11, it was held that a person wearing the uniform of the railroad company, and directed to be an official, directed the plaintiff to enter a train and away from the platform, and she was injured in attempting to enter the train as directed, the railroad company was answered that when such person told a passenger, "We have telegraphed for an extra train," and invited him to enter a shed, and the train arrived at a place other than the platform, directed to go and take it, these facts were sufficient *prima facie* evidence that such person was what he professed to be.

It has been contended that the reply to the plaintiff's question should be construed as an advice to alight then and there; but it should naturally be held to mean that he should get off at Baltimore at some intervening station. We cannot accept this view of the intended meaning. It might almost as well be said that the plaintiff's getting off should be understood to be a direction not to get off. To tell him if he did not want to go to Baltimore, he should get off at Baltimore, would be rather an extraordinary suggestion, and there is nothing to show that the train was to stop before it should reach Baltimore. Its natural meaning

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seems to have been understood correctly by the plaintiff. He saw the train was moving slowly, not faster than the walk of a nimble pedestrian. He must have known that as it got close to the interlacing tracks and rows of cars that cluster near a crossing, the speed would be greatly accelerated and that the train would soon approach that point, and that if he did not accept the suggestion promptly his chance of leaving the train would be altogether lost. He swears he himself thought he could jump with safety, and he supposed the conductor thought so too. There was nothing to show the conductor moved from the spot. If he thought it unsafe, it would have been a savage act to allow the plaintiff to make the jump, without trying to dissuade him. There was no word or act in that direction, and the plaintiff made the jump, as he believed, in the proper way, in the direction of the moving train. Had the condition of affairs which existed when the conductor advised him to jump remained unchanged for a few seconds longer, there would probably have been no injury; but the plaintiff accounts for it by saying: "The boiler, in my recollection is, as I stepped off, the engineer gave the engine a little more steam, and threw me off my balance." The engineer who thus increased the rate of speed was another employee of the defendant and his act also was that of the defendant. The result was precisely what appeared in the case of *W. & G. Co. v. Harmon*, 147 U. S. 571, where the plaintiff, an old man advanced in life, signaled the conductor to stop a street car. The car nearly came to a stop, and Harmon was in the act of alighting, when the conductor jerked the cord; the car started suddenly at a greater speed, and he was thrown to the pavement and injured.

Such was the state of facts in *B. & O. R.R. Co. v. Kane* (supra), already referred to, where the defendant railroad insisted the plaintiff attempted to board a train of cars while in motion, and the plaintiff testified he was thrown off by a sudden jerk of the car, and in *Central Railway Company v. Smith*, 74 Md. 212, where the plaintiff was injured by being thrown to the ground by the starting of the car.

If the supposed conductor, at the instant he gave the advice to the plaintiff in this case, had pulled the cord and thereupon increased the speed to the dangerous degree, the connection

endant with the result might appear more intimate; but intervening distance at which the engineer stood could not be a fact that one agent of the defendant was altering the conditions so as to make the jump a perilous one, at the moment the agent was practically advising him it would be safe for him to make it.

It is no longer a controverted point that the mere act of jumping from a car in motion, not at a high speed, does not in itself constitute contributory negligence in law. In 61 Md. 60, *Cum- mington Valley R.R. Co. v. Mangans*, where the plaintiff, knowing the car was in motion, stepped from it, having at the time in his hand a valise, which with its contents weighed from fifteen to twenty pounds, and a basket of provisions weighing from eight to twelve pounds on his left arm, while the train was moving slowly, and was severely injured, the lamented Judge Miller, in the course of a very able opinion, uses this language: "We agree that while the question of negligence is ordinarily one of fact and not of law, cases do occur (and perhaps the number of such cases is increasing) in which it becomes the duty of the court to interfere and withdraw it from the consideration of the jury. The question, however, must be a very clear one to justify a court in taking upon itself this responsibility. It must present some prominent and decisive act, in regard to the effect and character of which no room is left for ordinary minds to differ. Accidents and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule, applicable to all cases, so that a departure from it can be proved to be negligence in law. The rule that requires a party before crossing a railroad track to stop, look and listen for approaching trains, which has been generally adopted by the courts, is the only rule that approaches universality of application in reference to a particular class of accidents. But there is no such general accord in judicial opinion and precedent in reference to attempts to leave a car while it is in motion. The cases cited in the briefs of counsel on both sides show very clearly that the weight of authority is in favor of the proposition that it is always, as a matter of law, negligence and want of ordinary care for a person to attempt to get out of a car when it is in motion. . . . At all events, we are

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clearly of opinion that, whether there was negligence or ordinary care in the conduct and acts of the plaintiff, under the circumstances of this case, is a question in regard to which reasonable men may honestly entertain different views." In quoting from a Michigan case, he says: "When the question arises upon a state of facts on which reasonable men may arrive at different conclusions, the fact of negligence cannot be determined until one, or the other, of these conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they must be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fairminded men may well differ."

In a more recent case, decided in June, 1890, reported in 100 Md. 519, *P. W. & B. R.R. Co. v. Anderson*, a passenger on a train from Philadelphia for Chester at night, hearing the name of his station called and supposing the train had arrived at the depot, stepped on the car platform; the train started again slowly, and thinking it was leaving the depot, and not wishing to be carried to the next station, he stepped off on the south instead of the north side of the road, and without looking for approaching trains was instantly knocked down by a train going north. The plaintiff appeared the train from Philadelphia had not yet reached the depot when the name of the station was called, but had stopped to await the passing of the north-bound train, and that no notice was given that the train had not reached the depot, nor were the passengers told to keep their seats. Upon the whole evidence the defendant asked for an instruction that the plaintiff had been guilty of contributory negligence in his manner of leaving the car as to disentitle him to recover. This prayer was refused by the court below, and the jury found a verdict for the plaintiff. On appeal, after full statement and discussion of the law, the Court in 5-4 peals declared: "We do not see how we can hold as matter of law that the plaintiff was guilty of contributory negligence because he did not look out for the approaching train before he left the car in which he was traveling. In our opinion, the question was properly left to the jury by the instructions given at the trial."

And yet the point ruled upon there, which the court d

say was negligence in law, under the circumstances, was the act of negligence which, as Judge Miller says in 61 Md. approaches universality of application to this class of cases.

The most recently reported case in Maryland is *West. Md. R.R. v. Herold*, 74 Md. 510, decided in 1891. There the plaintiff had gone on a car with her children to a sanitarium near Baltimore city. When the train was about to return, in order to secure a seat, against the rules of the establishment, she entered a car standing at some distance from the platform and before the car was prepared to receive passengers. After she was seated, a boy loosened the brake attached to the car, which caused it to descend rapidly toward the platform by its own gravity, without any person in charge. The plaintiff became frightened, and following the example of others therein, jumped off and was injured. It is held that neither of these acts, nor all taken together, would justify the court to say, as matter of law, that the plaintiff was guilty of contributory negligence; that it was for the jury to decide whether the circumstances were such as to justify a prudent person in jumping from the car.

And this seems to be the rational rule to apply to each case as it arises. An act which might be of decided danger if performed by an invalid person, or by a woman incumbered by her skirts, might be quite a safe one if done by an athletic man in the vigor of youth. It is every day's experience that scores of people get on and off the street cars, while in motion, without injury, although every such act involves hazard of injury. In *Harmon's* case, the street car conductor testified that the plaintiff, though an old man, was in the habit of riding on the car and getting off while it was in motion. To say that what is done daily all over the country, though certainly unwise and to be condemned, is necessarily dangerous to the point of being contributory negligence *per se*, seems too much against human experience to be a reasonable argument.

We know, furthermore, that brakemen on trains, in rapid motion, move along the tops of cars and jump from one to another with safety. Every person has seen, particularly on northern railroads, two upright posts with cross-beams supporting a fringe of leather strips hanging down from the cross-pieces, which are arranged on each side of the bridges, to come in contact with the

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brakemen on top of the cars at night, who might otherwise have been warned of their proximity to the bridge, and thus give them warning of danger.

It is said by defendant's counsel, that cases like that of *McDermott v. Baltimore & Annapolis R.R. Co.*, Md. are not applicable to the case at bar, because in that class of cases the party was attempting to alight at a regular station where the company was charged with a duty to deposit passengers safely; whereas no such duty exists to set down a passenger between stations. But this consideration does not settle the question there considered, as to the negligence said to be implied from an attempt to leave a train in motion.

But we are not at all prepared to decide that a railway company has no duty to perform, under all circumstances, in landing a passenger between stations. If a passenger had been found to be traveling without a ticket and had refused to pay his fare, or if he had been riotous or disorderly on the train, the officials would not have hesitated to stop entirely and eject him, notwithstanding the supposed urgent necessity of saving a few minutes. And even if it appeared that a passenger (and it might equally happen to a score of them), by misinstruction of the company's agent, had gotten on the train by mistake, there could be no propriety in right in keeping them virtually prisoners until the arrival of the train at a point perhaps sixty miles distant from the destination to which they had contracted to carry them in safety. Such a delay might cause the passenger to lose his passage to Europe, or suffer a serious pecuniary loss; or delay the traveler from reaching in time the bedside of a dying friend; or, as in the case at bar, prevent his return to his work at a proper time. Could it be possible that if a passenger from Washington should be found to have died just after leaving the depot, his mourning wife would be allowed to return at once to her desolate home?

The plaintiff's reason for not asking the conductor to stop was answered by the prompt suggestion made to him by the conductor to do what, it seemed to him, and, as he testified to, he also believed, was a safe act, considering the slow rate of the train when he spoke and the physical vigor of the plaintiff, which we have seen, was shown to have been a railroad agent for many years, and to have gotten off of trains in motion (as the

and answers imply), though he denies he was in the habit of

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atts., Cin. & St. L. R.R. Co. v. Krouse, 30 Ohio St. 222,
he plaintiff, professing to be acting under the advice of the
or, immediately jumped from the train moving at the rate
or five miles an hour at a place not intended for passen-
alight, it did not appear the plaintiff acted differently from
ould have been his action without the remark of the con-
nor that he requested the train to be stopped or slacked
le him to get off in safety. But the court held that all the
stances, including those last named, were properly left to
r, upon the question of contributory negligence.

perfectly settled that, as the burden of proving contributory
nce rests upon the defendant, it must be established by
nderance of evidence. R.R. Co. v. Mares, 123 U. S. 721.
gh the fact may be equally proved by the testimony of a
himself, yet we cannot in the case before us say that in
gment of reasonable men such negligence was so estab-
y the testimony for the plaintiff at this trial as to justify
rt in declaring it was sufficient, as matter of law, to defeat
ery. Two juries are shown to have rendered verdicts
stent with such a conclusion upon what seems to have been
tially the same testimony for the plaintiff; and this court
eral Term, on the second appeal, used language tending to
that the facts testified to were not such "that all reasonable
ust draw the same conclusions from them," and that the
n was one "in regard to which reasonable men may not
in different views."

are only to be understood as deciding on this point, that
dence offered in behalf of the plaintiff was not of the char-
o justify the court's order in withdrawing the case from the
Beyond that we are not called upon to give any opinion,
stain from doing so.

judgment below is reversed, and the cause remanded for a
al, where the evidence on both sides can be compared and
upon by the jury.

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THE METROPOLITAN RAILROAD COMPANY JONES.

Court of Appeals, District of Columbia, September 21, 1893.

[Reported in 1 App. Cas. (D. C.) 200.]

INJURED WHILE ALIGHTING FROM STREET CAR—EVIDENCE AS TO CROWDED CONDITION OF CAR.—In an action against a street railway company for damages for personal injuries alleged to have been caused by the sudden starting of a car while plaintiff was attempting to alight, by reason of which starting plaintiff was thrown to the ground, evidence as to the crowded condition of the car at the time of the injury is relevant as a matter for the jury to consider whether plaintiff was negligent in attempting to leave the car, as well as whether the conductor should, on that account, have given more time for passengers to alight.

DUTY OF PASSENGER AND CARRIER.—When a car is in motion it is the duty of a passenger, who desires to alight, to give notice of his wish to the conductor, whose duty it is then to cause the car to be stopped at the proper place. But when a car has been stopped to let off and take on passengers, at a crossing, it is the duty of the conductor to ascertain those of his passengers who intend to alight, and to hold the car a sufficient length of time to enable them to alight in safety, by the exercise of reasonable diligence, and not to put the car in motion until the last one has left it.

WEIGHT OF EVIDENCE—INSTRUCTION.—The refusal to give the instruction asked by defendant which directed the attention of the jury to the pecuniary interest of the plaintiff and advised them to "receive the testimony with great caution, as not entitled to the same weight and degree of credibility as the testimony of a disinterested witness whose veracity has not been impeached," was proper. There is no rule of law which gives one competent witness greater weight than another.

HEARING on a motion by the defendant for a new trial on the ground of exceptions.

Appeal by defendant from a judgment for \$1,500 recovered by plaintiff in an action for injuries received by her April 1, 1888, while attempting to alight from one of defendant's horse cars in the city of Washington.

The evidence on behalf of plaintiff tended to show that the car on which she was a passenger stopped at the corner of Tenth and F Streets, to let off and take on passengers; that as soon as the car stopped she made her way out as rapidly as the crowded condition of the car and platform and her advanced age—several

ars—would reasonably permit ; that while she had one foot
lower step and was in the act of putting the other to the
the car was suddenly started ; that she was thrown vio-
own, and her leg broken above the ankle ; that her limb
and left in plaster for two months, after which she had to
ches for seven or eight months, and at the time of the
s not entirely recovered.

endant's evidence tended to show that plaintiff was negli-
low in getting out, and that she was not thrown down by
ting of the car, but was pushed out by a passenger who
just as she was going down the step. The court having
d defendant's motion for a new trial, it has appealed.

ANIEL WILSON and WM. G. JOHNSON, for the plaintiff
, cited: *M. etc. R.R. v. Marcott*, 41 Mich. 433 ; *F. & P.*
v. Stark, 38 Mich. 714, 719, 720 ; *C. & A. R.R. v. Rob-*
Bradw. 140, 145 ; *Edens v. H. & St. J. R.R.*, 72 Mo. 212,
Waldheir v. H. & St. J. R.R., 71 Mo. 514, 516 ; *Buffington*
v. P. R.R., 64 Mo. 246, 248.

LABARGER & WILSON and A. A. HOEHLING, JR., for
in error, cited: *Harmon v. R.R. Co.*, 18 D. C. 255 ;
v. Smith, 90 Ala. 60 ; *Thomp. on Carr.* 443 ; *Poulin v.*
Co., 61 N. Y. 621 ; *Nichols v. R.R. Co.*, 38 N. Y. 131 ;
Co. v. Mumford, 3 A. & E. R.R. Cas. 312 ; *Colt v. R.R.*
N. Y. Super. 189 ; *R.R. Co. v. Hendricks*, 26 Ind. 228 ;
& Redf. on Neg. (4 ed.) § 508 ; *Texas v. Chiles*, 21 Wall.
R. Co. v. Pollard, 22 Wall. 341.

pard, J.—The errors assigned embrace three propositions
will be considered in their order.

the first error assigned is, that "the court erred in directing
that they might find a verdict for plaintiff, without find-
fact the specific negligence alleged in the declaration to
been committed, but upon evidence of other negligence not

unquestionably true, as claimed by appellant, that where a
charge of negligence is made, the right to recover must
upon the proof thereof, and no recovery can be had upon
er ground not alleged in the declaration. *Flint & Pere*
tte R'y Co. v. Stark, 38 Mich. 714 ; *Edens v. Hannibal &*
R.R., 72 Mo. 212.

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The allegation of the declaration in this case is, that the driver and conductor so carelessly, negligently and unskilfully drove and managed said car that afterwards, and whilst the plaintiff was in the act of alighting from and leaving said car which had stopped for that purpose, etc.; . . . she using at the time proper care and caution, and without any negligence or carelessness on her part, by and through the mere carelessness, negligence, unskillfulness and misconduct of the said driver and conductor, and without any warning to the said plaintiff, said car suddenly started and put in motion, whereby the said plaintiff was violently thrown to the ground," etc.

It is claimed that the special prayers given at the request of the plaintiff, and the general charge of the court, permitted the jury to find for the plaintiff if they should believe that the crowded condition of the car was the cause of the accident, irrespective of the fact that the fall may have been proximately caused by the push of another passenger, and not by the negligent starting of the car at all.

If this assumption of the effect of the instructions to the jury be correct, the contention of the appellant would be sound. But we cannot hold with the appellee that this specific act of negligence is within the allegations of the declaration above quoted.

A careful examination of the charge and special instructions, however, we think shows that the court intended to, and did, limit the plaintiff's right of recovery to proof of the negligent starting of the car as she attempted to alight, and that the jury were not misled by the expressions with respect to its crowded condition.

While not expressed as clearly as it might have been, it nevertheless appears plainly enough that the crowded condition of the car was referred to only as bearing upon the question of plaintiff's own negligence in the delay attending her attempt to get out, as well as that of the conductor in failing to observe her situation, which is included in the charge of his negligence in starting the car too soon.

The charge of the court is too lengthy to be copied in full. In order, at the risk of unnecessary prolixity, we will state its substance fully, quoting its precise language where necessary only, in order that the question may be fairly presented and considered.

In the beginning, the issues are fairly stated, and plaintiff's

er is made wholly to depend upon proof of the charge was thrown from the car by its negligent starting while in the act of alighting.

court then read to the jury two special prayers of the nt, in substance as follows: 1st. If from all the evidence shall find the plaintiff's injuries were caused by her being or pushed, from the car by a person who was attempting to and not by the sudden starting of the car while plaintiff was act of alighting, she is not entitled to recover. 2d. If the lieve plaintiff was pushed from the car by a person not an f defendant, under such circumstances that defendant, by rcise of reasonable care, could not have prevented it, then not recover. The first of these prayers was given with this ation: "I do not desire you to get the understanding that as pushed, and at the same time the car started, and that tributed to throw her from the car, that would excuse the nt. It would not excuse the defendant if the starting of was responsible in whole or in part for her fall while ing to alight."

qualification was correctly made. One cannot escape the ences of his own negligence merely because another per- h whom he has no connection, or over whom he has no may have contributed to the injury by his wrongful or nt act.

court then said to the jury: "A good deal has been said case about the car being crowded. Upon that subject e you that if the defendant did permit its car to be so with passengers that egress was difficult, and necessarily en it was its duty to take that into consideration and to ore time, if necessary, for passengers to alight, and to f necessary, still more closely, to see that passengers who ng to alight had a reasonable opportunity to do so." The rayer of the plaintiff was then read as follows: "If from ence in this case the jury believe that the crowded con- f the car on its rear platform, from which the plaintiff ed to alight at the time she was injured, so obstructed her m the car as to cause a delay in her exit of such char- d extent as that, in the absence of such delay, the jury she would have safely alighted from the car and avoided

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the fall which caused her injury, then the defendant is liable for such condition of the car and platform which caused said fall.

Following immediately upon this, the court read the defendant's fifth special prayer as follows: "If the jury shall find from the whole evidence that, on the occasion described in the complaint, the interior of plaintiff's car and the platform were crowded with passengers, that fact did not excuse the plaintiff for not exercising of reasonable care in leaving the car, but did require her to exercise a degree of care proportionate to the danger attending the getting out of the car while in a crowded condition."

Having read these, the court addressed the jury thus: "I cannot, perhaps, find a better occasion than right here to say to you. I want to say upon that subject in explanation and, if necessary, in modification of both these prayers. If this lady was thrown off this platform while the car was standing still, as contended by the defendant, then the case which the plaintiff makes by her complaint has not been proven and she cannot recover. If she fell from the platform, or if she fell from the car while in the act of alighting, and that fall was occasioned by the starting of the car while she was in the act of alighting, then she can recover, if you think it was her own carelessness which was the occasion of the fall. With reference to the crowded condition of the car, I have already stated in substance, that should be considered by the jury, if it be true, for the purpose of determining whether the defendant exercised reasonable and proper care all around. If the car were crowded and the platform were crowded, then it is entirely proper to say that in considering how much time ought to have been given to this plaintiff to make her egress properly from the car."

The language of the fourth prayer given on behalf of the plaintiff, as quoted above, taken by itself, is open to the objection made to it, and without qualification might probably have been sustained by the jury. Taken in connection, however, with the entire charge, and especially with that part which follows and expressly qualifies it, we do not see how it could have had that effect, and therefore, if any, is immaterial.

The evidence regarding the crowded condition of the car was given without objection, and was plainly relevant as a circumstance for a jury to consider in determining whether the defendant was negligent in attempting to leave the car, as well as whether

the conductor should, on that account, have closely observed the passengers desiring to get off and given them more than ordinary notice for the purpose.

Considered in this light—and we think it was so presented to the jury—the fact was material in the proper determination of the main fact upon which the case necessarily turned, viz.: was the car started prematurely, and did this wholly cause, or in connection with the wrongful act of a third person, contribute materially to the injury?

The second error assigned is, the refusal of the court to hold that, “the plaintiff was bound to give notice of her intention to leave the car, if the circumstances were such at the time that the conductor could not know of her intention.”

As an abstract proposition of law, this charge would be correct; but its application to the facts of this case, it would be erroneous and misleading.

When a car is in motion it is the duty of the passenger who wishes to alight to give notice of his wish to the conductor, whose duty it is then to cause the car to be stopped at the proper place. When a car has been stopped to let off and take on passengers crossing, it is the duty of the conductor to ascertain those of the passengers who intend to alight, and to hold the car a sufficient length of time to enable them to alight in safety, by the exercise of reasonable diligence, and not to put the car in motion until the last one had left it. *Railway Co. v. Smith*, 90 Mo.

It is an undisputed fact in this case that the car had stopped to let off and take on passengers, and that plaintiff undertook to get off before it was again started, and hence the charge asked for no application whatever.

The conductor was, at the time, engaged in other duties and could not observe plaintiff at all in her attempt to leave the car, and under the circumstances, this fact would rather aggravate than excuse the charge of negligence.

As we have before said, it was his duty, when the car stopped, to see that all passengers attempting to get out were safely off before starting the car, and he ought not to have engaged in any other act which would prevent this observation. *Harmon v. W. & A. Co.*, 18 D. C. 255; S. C., 147 U. S. 571.

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3. The third error assigned is, the refusal of the court to a special prayer offered by the defendant, which directed attention of the jury to the pecuniary interest of the plaintiff and advised them to "receive the testimony with great care as not entitled to the same weight and degree of credibility as the testimony of a disinterested witness whose veracity has not been impeached," etc.

This instruction was properly refused. There is no rule of law which gives one competent witness greater weight than another. Naturally, the jury, in weighing the evidence, especially where there has been a conflict of witnesses, may take into consideration the interests and relations of those who testify; but they should carefully refrain from the expression of any opinion in respect thereto.

We concur in what has been said by the Supreme Court of Alabama in a case directly in point: "It can never be affirmed as a matter of law, that it is the duty of the jury to give more weight to the evidence of one witness than they accord to another on the ground of interest in the one and lack of it in the other. On the contrary, it is always competent for the jury to believe or disbelieve a witness, wholly irrespective of any interest he may have in the litigation." *Railroad Co. v. Watson*, 10 Ala. 70.

There being no error, the judgment of the court below stands affirmed in all things affirmed, and it is so ordered.

Affirmed.

THE JACKSONVILLE STREET RAILWAY COMPANY v. CHAPPELL.

Supreme Court, Florida, January, 1885.

[Reported in 21 Fla. 175.]

DEGREE OF CARE TO BE EXERCISED BY DRIVER IN CASE OF ALLEGED CRIPPLED BUT APPARENTLY WELL PASSENGER.

— Where it appears that a passenger entered a street railway car, and he was about seating himself the car started and he was thrown from the floor, and there is no evidence that it must have been apparent to the car driver that the passenger was in a crippled condition, a charge against the driver was called upon to use a greater degree of care than in the case of an apparently well and sound passenger is error.

APPEAL from the Circuit Court for Duval County. The evidence at the trial was as follows :

Chappell testified that between November 15 and 20, 1882, he walked down and took the cars at the corner of Market and Duval Streets ; that he entered the cars and walked to the forward end and turned to seat himself, and the car suddenly started, throwing him a little sideways, so that his leg struck the seat, and he fell to the floor of the car ; the driver then stopped the car and assisted him up, and said he was very sorry ; that he thought Chappell was seated. Chappell told him he should have been sure of it before he started. Chappell kept on the car and went to 'the shop.' Chappell was quite lame for several days, but continued to ride back and forth for four or five days, and then became so lame that he could not get into the car, and then walked home and back for several days until he was unable to walk, and had to stay at home. In reply to a question as to whether he saw the driver of the car when he hailed it to stop, and if the driver saw him after he got inside of the car and before starting the same, he says : 'Suppose I must have seen the driver. I beckoned and it stopped. I don't know whether the driver saw me after I got inside the car.' He says he was confined to his 'house and very bed' for about four months, from the effects of the fall on the car. Dr. P. E. Johnson attended him. Before the accident he made from \$100 to \$200 per month ; it depended on the amount of business he had. Got out about April 1, 1883, and did some stock work, which is building a lot for sale. About middle of June began on work ordered since the accident. After he began in June he made about \$100 per month until November 1, 1883, since which time he has made nothing. He has made \$450 since his fall. On cross-examination, he says he first made complaint to the company about March 1, 1883, to Mr. Haines. He saw Mr. Harrison shortly after the accident, but has no recollection of telling him that he did not think any one was to blame for the accident ; told him he thought he should be paid for lost time. After the accident, and before being laid up, he worked ten or twelve days, rode four or five, and then got too lame and walked to and from his shop for a few days. Can say positively that this four or five months' loss of time was due to the accident. Since it, he says, he has

not been able to stand without crutch or cane, and when he was in the shop could only sit and superintend the work.

"Dr. Johnson testified that he has been attending Chappell as his physician for about ten years, during which time he has been suffering from irritation of the spine. After the accident testified to he suffered with aggravation of the disease; the aggravation was increased after the accident; they were the usual symptoms of aggravation. He has always considered the case rheumatic. The aggravation after the accident was very similar, but more severe than it had been before. On cross-examination he says he never saw Chappell about ten years ago; his case was more particularly rheumatic; he has never lost the power of locomotion during this time. Should term it spinal neuralgia that he was suffering with. It is troublesome to cure, but not always a continuous downward course. Had seen plaintiff every year since the accident; during each year he would be better and worse. 'The marked fluctuation of the case shows that the disease was on the increase.' In the summer previous to the accident Chappell had been working from rest and relaxation he was better than he had been before. Thinks he walked with a cane, and resumed his labors in the shop. Saw him two or three days after the accident; there were no bruises on him. Was not told of the accident on the first visit, but was told on inquiring on the second visit after the accident. 'When I was called to see plaintiff he was not able to get up except from his crib to his bed. Saw him before he went to bed; he had been suffering more than usual. I advised his treatment; he was suffering with general debility and more rheumatic than usual. He has labored when he was not able to. After his return from the North he was more vigorous than I had ever expected him to be, but not permanently restored; and without continuing from labor he would never be permanently restored. Before the accident he would get into a condition in which he could not work, and then again would be able to work.'

"Dr. Kenworthy, a witness for the defendant, testified that he was called to see Chappell about five or six years ago. He was then suffering from inability to use the lower portion of his body—'partial paralysis, a slow form of myelitis, inflammation of the spinal marrow;' in its earlier stages it is curable, but when it has progressed for a time it becomes incurable. When he

Chappell, as near as his memory serves him, Chappell had been in moving about the house. Have repeatedly seen him afterwards became better, and at other times he was with crutches, and then riding in a cart; at times he got better, then worse; this is one of the characteristics of the disease. As a rule, it is a progressive disease. 'I thought he would be restored to perfect health.' He could not do a day's work when witness saw him. Have seen him in the shop when he was at work directing others; for several years back I think he was able to do a full day's work—a day's work as a day-laborer.

Harrison, a witness for the defendant, testified that he is, three years has been, the foreman of the defendant. Does not know who the driver was at the time of the accident; supposed to be Mr. Parker; have endeavored to find him, but without success. About four months after the accident had an interview with Chappell at his house. Chappell reported the case to the company. Asked Chappell what he wanted, and he said he wanted the company should pay him for the loss of time. He answered my question as to whom he thought was to blame, that he did not think he could blame anybody. He said that he had been in the car, and before he seated himself the car started. The accident was reported to the company about the first of August, 1883. The cars have loops or bands for persons to hold on to steady themselves. Very often persons will ride the cars in this position standing.

W. Wheeler, a witness for defendant, testified he had been in the city of Lowell about ten years, and is acquainted with plaintiff. When witness saw him he was crippled up; it was in 1882. He was on crutches part of the time; walked with a stick. When witness last saw him he used to go down to the shop. 'I don't think he could do a day's work, but he could boss his own work; he told me that he was a cripple.'

Chappell, in rebuttal, testified in behalf of her husband, that he was present at the interview between him and Harrison; explained how the accident happened, but did not state who did not blame any one, but said he blamed the driver."

ING & DANIEL, for appellant.

HALL, WALKERS & FOSTER, for appellee.

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Raney, J.—1. The first error assigned is that the judge erred in charging the jury as follows: "If you find from the evidence that it was apparent to the car driver that the plaintiff, when he entered the car, was in a crippled condition, having to use a cane or crutches to aid him in moving about, it was the duty of the driver to use a greater degree of care than in a common case of an apparently well and sound passenger. It is urged that there was no testimony 'going to show' that it was apparent to the driver that the plaintiff, when he entered the car, was in such a condition as is assumed by the charge, and consequently none to base this charge on, and that, therefore, the charge tended to mislead the jury.

It is contended by appellant and admitted by appellee in their briefs that the only testimony as to what transpired at the time of the accident is that given by the plaintiff, Chappell. "It is true," says the brief of the appellee, "that he does not testify directly as to his condition then. But he was not asked about it, as doubtless he would have been had he been examined in court instead of out of court while confined to his bed from the injuries caused by this accident, he having volunteered no testimony, but confined his answers closely to the questions propounded."

The injury is alleged to have been done in November, 1882, in the city of Jacksonville. The trial took place in May, 1883, the action having been commenced in July, 1883.

In *Cogswell v. Oregon & Cal. R.R. Co.*, 6 Ore. 417, it is said: "And from the evidence in this case it appears that unless the deceased was very deaf he would have heard the whistle of the engine when it was within a few rods of him, and that he would have been warned of its approach in time to escape from the track. We think that the evidence shows that his deafness was the proximate cause of the injury, and he being aware of this infirmity, was guilty of gross negligence in being on the track, as he was walking laterally along it. It was a position of great danger to one who could not hear, and shows recklessness in the deceased. . . . We think that when a train is moving over a track in its ordinary speed, and a person is seen walking on the track, apparently in possession of his ordinary faculties, the engineer may justly suppose that he will get off the track on sounding an alarm that the train is coming, and under the evidence in this case, if the deceased had no

we think his remaining on the track was such gross negligence that no recovery could be had."

Central R.R. Co. v. Feller, 84 Penn. St., where the plaintiff was deaf, it is said: "He was somewhat deaf, but this was known to those on the train, even if they could have supposed he would drive on past the watch house. But he, himself, being aware of his own defect, had a greater reason for caution in crossing." In *Evansville, etc. R.R. Co. v. Hiatt*, 17 Ind. 104, the court say: "If it be said that the father was old and feeble, and unable to get out of the way of the train, then we say the carelessness, the rashness, of going upon the track in front of an approaching train was still greater, and involves those who were with the old gentleman to the same extent, in the carelessness in preventing him from going upon the track, or at all events in keeping close to him with watchfulness while he was on it."

In *French v. Phil. W. & B. & R. Co.*, 39 Md. 574, it is held that where the employees in charge of a railway train have given the usual and proper signals to warn persons of their approach, they are not required to stop the train on discovering a person on the track, unless they have reason to believe that he is laboring under some disability, or that he does not hear or comprehend the signal.

In the *C. C. & C. R. Co. v. Terry*, 8 Ohio St. 570, it is laid down that where the party injured is an adult of ordinary mental capacity, but partially deaf, her infirmity not being known to the servants of the company, it will not increase their responsibilities as to care; nor will it excuse her from the full measure of care which prudent persons, partially deaf, but conscious of their infirmity, would ordinarily observe under similar circumstances.

As we understand the authorities, unless the representatives of the company know of or have reason to believe the existence of a disability, the company is held to no greater care than if such disability did not exist. Is there any testimony showing "that it was apparent to the car driver that the plaintiff, when he entered the car, was in a crippled condition, having to use a cane or crutches to aid him in moving about?" As admitted by counsel, the plaintiff is the only witness who testified as to the accident. In reply to a question propounded by his counsel, as to whether he saw the driver of the car when he hailed it to stop, and if the

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driver saw him after he got inside of the car, and before starting the same, he says: "Suppose I must have seen driver. I beckoned and it stopped. I don't know whether the driver saw me after I got inside of the car." There is no testimony that the driver saw or had ever known of his condition or infirmity; there is no testimony that the driver saw him before he got on the car, or that, seeing him, the circumstances or surroundings were such as to prompt the driver to see the external evidence of his infirmity, or that the sight of him would have suggested the infirmity to a man of ordinary discernment and exercising due care. There is no testimony that the plaintiff used either a cane or crutches at the time, nor that if he used a cane, that the manner of its use was such as to suggest to a person the existence of the infirmity. It is true that Dr. Johnson, in speaking of Chappell having returned from the North, and being improved by his trip, says he thought he walked with a cane. This cannot be considered as proof that he used a cane on the occasion in question. Dr. Kenworthy's testimony, that he was called to see Chappell five or six years ago, and that he was suffering from inability to use the lower portion of his body, and had difficulty in moving about the house; that he, the doctor, has repeatedly seen him since and that he afterwards became better, and at other times, was walking with crutches, and then riding in a cart; that at times he would be better and then worse—considered either alone, or with his own testimony, does not show either that Chappell used crutches or a cane at the time in question, or that if he ever used a cane, that his appearance when using it was, or that the infirmity was, must have been apparent to the car driver that day. Although Wheeler testifies that Chappell was on crutches part of the time, and sometimes walked with a stick, he says nothing as to the particular time in point, and it is not a basis for the charge, but is subject to the same criticisms that we have given the plaintiff's testimony. We do not think there is any testimony from which it could be inferred that it must have been apparent to the car driver that the plaintiff was in a crippled condition, having to use a cane or crutches to aid him in moving about, or that consequently he was called upon to use a greater degree of care than in the case of an apparently well and sound passenger. We do not think the charge should have been given. *R.R. Co. v. H.*

ton, 95 U. S. 697, 703. There is nothing in this case or presented by the testimony calling for the exercise of the "greater degree of care" contemplated by the charge. It is not meant that what is said above to impute negligence to the plaintiff, as we are not dealing with that particular question.

2. Negligence is the failure to observe, for the protection of another's interests, such care, protection and vigilance as the circumstances justly demand, and the want of which causes him injury. - And it cannot be presumed, but must be affirmatively proved. *Brown v. Street R'y*, 40 Mich. 153.

The burden of proof is on the plaintiff to show that the defendant was negligent, and that his negligence caused the injury. *See on Rail.* 298. The negligence of the defendant is the gist of the action, and the absence of negligence on the part of the plaintiff is equally important. *Dey v. N. Y. C. R. Co.*, 34 N. Y. 18 N. Y. 248.

As to the liability of a railway company as passenger carrier, two things are requisite—that the company shall be guilty of some negligence or omission which mediately or immediately produced or enhanced the injury; and that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury; since no one can recover for an injury of which his own negligence was in whole or in part the proximate cause. 2 Redf. on Rail. 240. We are unable to find in the testimony any proof of negligence on the part of the defendant, within the rules laid down as to the duty of the driver, so far as the plaintiff is concerned, under the circumstances. It does not appear what time the driver gave him to get in the car and get seated. There is no proof to show that the time given was not amply sufficient for a person having no infirmity to get in and take his seat, or even also deposit his pay, if such be the rule. There is no proof as to the suddenness or degree of the force with which the car was started, none that there was any shaking, or that it was started in any unusual manner. 38 Mich. 6. The conduct of the driver after the mishap does not of itself indicate a spirit careless of the welfare of his passengers, or that he had started in a manner regardless of or thoughtless as to their comfort or interest. We see no proof of such negligence or omissions upon the part of the driver as show a failure

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to observe such care, precaution, and vigilance as the circumstances demanded—in a word, no affirmative proof of negligence. When we ask where is the proof of negligence, what the doings, and the manner and mode of time of the doings, is the omission showing the negligence, the record does not send them. It is not necessary to establish negligence on the part of a plaintiff to relieve a defendant from the same charge. The mere fact that an accident has occurred does not prove negligence in the defendant. The plaintiff must show that the accident was caused by the defendant's negligence; till this is shown the defendant may remain passive at the trial.

A new trial is awarded.

THE GEORGIA RAILROAD AND BANKING COMPANY v. McCURDY. (1)

Supreme Court, Georgia, January, 1872.

[Reported in 45 Ga. 288.]

RAILROAD COMPANY IS BOUND TO STOP ITS TRAIN AT A STATION TO WHICH PASSENGER HAS PAID FARE.—A railroad company that takes the fare of a passenger to a particular station on its road is bound to stop at that station to let a passenger get off. PASSENGER JUMPING FROM A MOVING TRAIN BY DIRECT ORDER OF CONDUCTOR MAY RECOVER FOR INJURIES.—If a railroad train is slackened at a station, for the purpose of allowing a passenger to alight, and to which he has paid fare, and the passenger is afraid to get off, and informs the conductor, who has the train again slackened after the passenger is passed and he directs the passenger to jump off and the passenger does so and is injured, the railroad company is liable. (2)

FROM DeKalb Superior Court.

McCurdy paid his way to News Station, which was a wood water station only, and the conductor agreed to put him off there. When they got there the train was slackened; but McCurdy, being a heavy man, was afraid to get off. He went forward to see

1. Cited in *Western R.R. Co. v. Young*, 51 Ga. 489, 492, 2 Am. Neg. Cas. 354; *Western R.R. Co. v. Drysdale*, 51 Ga., 644, 646; *Central R.R. Co. v. Smith*, 69 Ga. 268, 2 Am. Neg. Cas. 379.

2. This case is used as authority to decide a similar point in *Western R.R. Co. v. Young*, 51 Ga. 489, 492, 2 Am. Neg. Cas. 354.

conductor, who angrily blamed him for not getting off, and who again slackened up for him to get off; and while the train was so slackened he got off, and in so doing injured his ankle. At the trial the court told the jury that plaintiff could not recover, if the injury was caused by his own negligence; that if he and defendant were both negligent, and if he could not have avoided the injury caused by defendant's negligence, the plaintiff could recover; but the damages must be apportioned according to the fault of each. The jury found for plaintiff \$500 and costs. Defendant moved for a new trial, upon the grounds that the verdict was contrary to said charge, etc. The refusal of a new trial is assigned as error.

HILL & CANDLER, HILLYER & BROTHER, for plaintiff, in error.

L. J. WINN, for defendant.

McCay, J.—1. The evidence is very plain that the railroad company, through its agent, the conductor, undertook to carry John W. McCurdy from Atlanta to the station referred to. This, as we think, bound them so to do. It makes no difference whether they were in the habit of doing this or not. By taking his fare to that point, they undertook to carry him there and put him off. But on this point the evidence is rather in favor of the idea that it was the usual practice of the road to take passengers for that point. Why announce in the published rates the price from Atlanta to that point? But, as we have said, the company undertook to carry him to that point, and to let him off there; surely the conductor is an agent authorized to make such a contract, as it is directly in the line of his business. If he were to take a fare for four miles, he would be bound to put his passenger off there, unless there was an agreement not to do so. It seems to us this settles the question; for it will not, for a moment, be contended that if they undertook to carry the passenger to a particular point and put him off, they could fulfill this undertaking by slackening the speed at that point so that the passenger might—running the risk of his life—jump off from the moving train. But they did not even do this; they passed on until notified, when the conductor ordered the train to be again slackened.

Who that has seen much railroad traveling can fail to see in his mind the picture of this scene? The conductor in a pet; his train bound to take up its speed at an unusual point; the passenger

conscious that he was giving unusual trouble; the train slack speed; he stands ready, the conductor ready also, to give the word—now jump. None but a timid, and yet resolute, man would fail, and jump he did. We are clear this was not conforming with the contract. Nor can this road defend itself on the ground that it acted so badly, that with ordinary prudence the man could have seen it was dangerous to jump. The railroad was bound to put him off; to stop its train for this purpose. This it failed to do, and it was not want of ordinary care in the passenger to jump, the only means to get off the course of the defendant's train.

2. We think the verdict of the jury sustained by the evidence as to the amount of the damages.

Judgment affirmed.

BLODGETT, SUP'T, v. BARTLETT. (1)

Supreme Court, Georgia, July Term, 1873.

[Reported in 50 Ga. 353.]

STOPPING TRAIN AWAY FROM ITS USUAL STOPPING PLACE AT STATION—PASSENGER RINGING BELL—GROSS NEGLIGENCE.—In an action to recover damages for injuries sustained in alighting from a car, it appeared that a railroad train was stopped at a station, but somewhat away from its usual place of stopping at that station, where there was not good ground for getting off, and a passenger, thinking the train would be moved up to the usual place, failed to get off where he had intended, and after the train had left the station and was fairly on its way to the next stopping place, he himself seized the bell-rope, and rang the engine bell, and took his position on the lower step of the platform to get off, and the engineer answered the bell, and as the cars were coming to a stop, but before they were stopped, the passenger, thinking the motion slow enough for safety, undertook to step off, but just as he was stepping he was, by a sudden jerk of the cars, thrown down, and his arm crushed by one of the wheels of the car passing over it; *h*eld, that the conduct of the passenger in himself ringing the bell, taking his position on the step, and undertaking to step off whilst the cars were still in motion, was a want of ordinary care, and showed gross negligence on the part of such passenger.

CHARGE AS TO NEGLIGENCE OF COMPANY.—In such action it was *held* error in the court, under the facts, to charge the jury in effect that the road would be liable, if, at the time of his attempting to step off the cars were moving so slowly as that he thought it was safe to step off.

1. Cited in *Jarrett v. R.R. Co.*, 83 Ga. 347, 350.

OM Gordon Superior Court.

Blodgett brought case against Blodgett, as superintendent of the Western and Atlantic Railroad, for \$25,000 damages, alleged to have been sustained by him on account of the negligent conduct of the defendant in his avocation as a common carrier. The declaration charged that the plaintiff embarked on the cars of the defendant at Atlanta, for the purpose of being transported to Calhoun, a station on the line of defendant's road; that said cars were ordered to stop at the usual station at Calhoun, whereby plaintiff was forced to disembark at an unsafe point, and in attempting to get off the train at said improper place, through no fault of his, his right arm and hand were crushed to such an extent as to render amputation necessary.

The defendant pleaded the general issue, and that if the plaintiff was injured, as alleged in his said declaration, it resulted from his own negligence.

The plaintiff testified substantially as follows: Lost his arm in consequence of an injury received on the Western and Atlantic R.R. on May 7, 1870. He got on the train at Atlanta for the purpose of going to Calhoun. When the train reached the latter point it did not stop at the usual place. He looked out, but did not at that time know that he was at Calhoun. The train stopped below the end of the depot. The car in which he was was below the end of the hotel. Has since stepped the ground. The place where he was stopped was one hundred and fifteen steps from the depot. The ground at that point was very rough, and it would have been exceedingly difficult there to have disembarked from the train. On the west side there were switches and probably two and a half feet deep. On the east side there was a steep bank and a ditch. The ends of the cross-ties were rough and above the surface, and about eighteen inches high. He thought the train would pull up to the plank platform at the depot, the usual place of discharging passengers. There had been a railroad picnic at Marietta, and on account of the large number of persons on board, the train was longer than usual. He was in the third or fourth car from the engine. When the train stopped he came out of the cars and stood on the platform. Saw a man get off a car below the one he was on; two gentlemen with him assisted her. The train remained stationary one and a

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half or two minutes and then moved off rapidly. It passed the depot, and plaintiff perceived it was not going to stop. When he was about opposite Boaz & Barrett's storehouse, he reached the bell-rope and rang the bell; the engine blew off the steam, the brakes and the train began to slack up. It had run some three hundred yards after he had rung the bell, and was moving very slowly when he got down on the steps, his left foot on the lower step, and was holding onto the iron railing of the car with his left hand. The train had not stopped, but he thought it safe to get off. Just as he attempted to step off with his right foot, the train gave a sudden and violent jerk, which threw him off his balance, causing him to fall on his left side with his right arm across the track; thought from the suddenness of the jerk that the engineer had pulled open the throttle of his engine. The rear trucks of the car passed over his hand diagonally. He pulled himself off the track and got up. As the rear car passed him, a man on the hand asked him if he was hurt; replied that he was ruined. The train hand jumped off and came to him. Had been, during his life, a railroad conductor, and knew it was hazardous to get on a train when in motion. Was not drunk, had only taken a few drinks on that day. The accident happened about midnight, it was very dark. The remainder of plaintiff's testimony related to the extent of his damages, etc. He was corroborated as to the unusual point at which the train stopped, upon its arrival at Calhoun, and as to the time it remained there, by several witnesses.

The evidence for the defendant tended to show that the train stopped at the usual point at Calhoun, remained the usual length of time, and moved off in the ordinary manner. Also, that plaintiff was drunk.

Among other things, the court charged the jury "that if the train carried the plaintiff beyond his point of destination, it should have waited until the train should have been stopped so nearly so as to make it apparently safe, and then get off, or if he suffered himself to be carried to the next station, and then sued for damages from loss of time, and for the inconvenience, labor and expense of traveling back."

The jury returned a verdict for the plaintiff for \$4000. Defendant moved for a new trial, because the verdict was

ary to the law and the evidence, and because of error in the
oresaid charge. Motion overruled, and defendant excepted.

J. A. GLENN, D. A. WALKER, J. C. FAIN, J. E. SHUMATE, for
aintiff in error.

W. H. DABNEY, J. A. W. JOHNSON, for defendant.

McCay, J.—1. Assuming that the employees of the Western
d Atlantic Railroad were in fault in not stopping the cars at a
uitable place for the plaintiff below to get off, it does not at all
low that the company is liable for the damage which was sub-
quently inflicted. A prudent man, under the circumstances,
uld have sought the conductor, or gone on to the next station,
if any injury came from this he would have his right of
on. But the plaintiff took the affair into his own hands. He
the bell to the driver to stop the train. This he had no
to do; at least, only in very extraordinary cases has a pas-
er a right to do this. The rope is not there for the use of
ngers, but to enable the conductor to communicate with the
eer. So dangerous a thing as a train of cars is not to be at
necy of a passenger. The public interest, as well as the
of the railroad company, require that the bell rope shall be
d to the touch only of the proper officer. When the bell
ng, and the driver commenced obeying it, the plaintiff had
usiness on the platform; at least he was there at his own
ill the cars stopped. The platform is not a safe place to be,
it is not made to ride on; still more careless was he to go
upon the step, where any sudden jar might throw him off.
n our judgment, it was perfect recklessness to attempt to
off before the cars stopped, especially as the signal to stop
ot come from the proper person. That at the moment there
jerk of the cars, does not, we think, help the case. Such
in stopping must occur, and when he undertook to take con-
of the train, and leap from it in the dark, he should have
ght of this liability. That he thought the speed was suffi-
ly slackened is his misfortune. And it seems to us absurd
y that a railroad company, in stopping its cars, is bound so
op them as to avoid danger to passengers who undertake to
ff before the stoppage is complete. No man has a right to
ne that it is safe to get off a train that is running at any
l, since, until it is entirely stopped, there may or may not be

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changes of motion, jerks and other irregularities, danger one in the act of getting off.

2. We think the court erred in charging the jury that the train was liable if the cars had got so slow as to make it appear safe. It was not an open question under the evidence. The cars, according to the plaintiff's own testimony, were in motion, and so rapidly that they did not finally stop until some ten or twelve cars' lengths from him. No man of ordinary prudence would have done such a thing; it was a rash, reckless act, and displayed a want of ordinary care. We are ready to hold railroads to the strictest terms of liability, but to say that a passenger who was to get off and who, under the circumstances, has a right to get off, may take it upon himself to ring the bell and leap off while the cars are still in motion, however slow that motion may be, we think, laying down a rule not only unjust in itself, but dangerous to the public safety.

Judgment reversed.

THE WESTERN RAILROAD CO. v. YOUNG

Supreme Court, Georgia, January, 1874.

[Reported in 51 Ga. 489.]

CONDUCTOR AGREEING TO STOP TRAIN AT PARTICULAR PLACE, NOT A STATION, MUST DO SO.—If the conductor of a railroad train agrees to put a passenger off at a particular place, whether a station or regular stopping place, it is the conductor's duty to stop the train at that place, although the passenger had a ticket only for the last station passed before reaching the place at which he was put off.

IF AGREEMENT WAS TO SLACKEN SPEED OF TRAIN, IT MUST BE SO SLACKENED THAT PASSENGER MAY SAFELY ALIGHT.—If the agreement with the conductor was that the train would stop, but its speed only slackened, it was not error in the charge the jury that the speed of the train should be so slackened that the passenger could get off safely.

REFUSAL TO CHARGE.—It was not error in the court to refuse to

1. Cited in *Central R.R. Co. v. R.R. etc. Co. v. McCurdy*, 69 Ga. 268, 2 Am. Neg. Cas. 288, 2 Am. Neg. Cas. 348.
379. Decided on the authority of Ga.

"that if the train slackened up so that plaintiff might have gotten safely off, it was for plaintiff to determine whether he would get off or not; and if he did get off, and in so doing was injured, he is not entitled to recover."

FROM Muscogee Superior Court.

action by Allen Andrews against the Western Railroad Company for \$5,000 damages, alleged to have been sustained by him account of the negligent running of its cars by the defendant. general issue was pleaded.

the trial plaintiff testified substantially as follows: He bought a ticket to the Steam Mills station on said road; he was traveling with a friend. The cars did not stop at said point, and, upon inquiry, he was told that the conductor would put them off at a point nearer the place to which he was going; when the cars reached the crossing plaintiff was notified of the fact by his friend; they went to the rear of the cars; the train having slackened up, his friend got off; plaintiff was standing on the bottom step of the car, waiting for the cars to stop, that he might get off; in this position the whistle blew "off brakes," the car suddenly jumped forward, jerking plaintiff off the steps, throwing his body suddenly around while his weight was on his foot, throwing his right knee out of place, throwing him violently on the ground, greatly bruising his hip and side. He remained there until the evening train came along, and tried to get them to bring him back to Columbus, but the conductor refused to stop and take him on. He hired men to carry him, on a litter, back to the Steam Mills; next morning was brought home, where he was confined to bed over two months; was attended by Dr. Billing, and paid him \$22 or \$23, to which was added medicine, \$3; was unable to transact any business until the middle of July; was a mechanic; received \$4 per day when he was well; could not get up very well now, nor bear his weight long at a time on that day. On cross-examination, plaintiff stated he had never stepped off the train when in motion.

One Renfroe corroborated substantially what plaintiff had testified; that he was a mechanic; that plaintiff's work was worth \$3 to \$4 a day. Others testified plaintiff was worth \$3 to \$4 a day. Plaintiff was sixty or sixty-five years of age.

Defendant introduced one Hughes, who testified that he was con-

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ductor of the train on which plaintiff was passenger at the time he was injured. Plaintiff was with a white man, and both went to look at land, at a point beyond Steam Mills, a regular stopping place for trains on said road; before arriving at Steam Mills the white man stated to witness that he and plaintiff wished to go to a point beyond Steam Mills and get off at a crossing, a witness to put them off there; witness replied that, as the train was behind time, he could not stop; he would slack up at the next crossing; plaintiff and white man had tickets only to Steam Mills; they paid nothing for riding beyond Steam Mills; they went on to Steam Mills; as train neared crossing it slacked up, and the white man went back through the cars to tell white man and plaintiff they were ready to get off; both had gone out of the car, and were standing on the lowest step of the car, one on one side, and one on the other; the white man got off a few yards from the road; plaintiff, as soon as he saw white man get off, attempted to get off the car, and in doing so fell and was injured. Plaintiff, in getting off, stepped in rather an opposite direction from that in which the train was moving; after plaintiff was off witness pulled back the train and train went on; the train was moving at the rate of about one and a half miles an hour when plaintiff got off.

The court charged, that "if plaintiff had bought a ticket to Steam Mills, and it was afterward agreed to put him off at the next crossing, this was as if he had originally bought a ticket to the next crossing; that it was the duty of defendant so to manage the train that the plaintiff could get off in safety, even if they had to slack up the train; and if defendant failed to slack up so that an old man could get off in safety, and in endeavoring to get off he was injured, it was the neglect of defendant, then defendant was liable to plaintiff for the injury from such neglect."

Defendant excepted to this charge and requested the court to charge, that "if the defendant agreed to take plaintiff to Steam Mills, and put him off there, but plaintiff requested conductor to take him to a point further on the road where there was no regular stopping place, and the conductor agreed to do so, but only slack up, and not stop, then if the train did slack up and plaintiff got off, plaintiff might have gotten off safely, then, although plaintiff was injured in getting off, defendant is not liable in damages." The court refused the charge as presented, but qualified it by

the train must slack up so that plaintiff could get off safely." Defendant excepted.

Defendant also requested the court to charge, that "if the train slack up so that plaintiff might have gotten off safely, it was for plaintiff to determine whether he would get off or not, and if he did not get off, and in so doing was injured, he is not entitled to recover." The court refused to so charge, and defendant excepted. The jury returned a verdict for the plaintiff for \$591.

The case is assigned upon each of the grounds of exception.

Andrews having died while the case was pending in the Supreme Court, his administrator, Richard Young, was made a plaintiff in his stead.

RODNEY & BRANNON, J. F. POU, for plaintiff in error.

AMAM & CRAWFORD, for defendant in error.

Opinion, J.—1. The case of the Ga. R.R. and Banking Co. v. Andrews, 45 Ga. 288 (1), we think, determines the first point in the case. If the conductor of a railroad train agree to put a passenger off at a particular place, whether it be a regular stopping place or not, it would be the duty of the conductor to stop the cars at that place that the passenger could get off in safety. It cannot affect the rule that the passenger had no right to go only to the station last passed, before reaching the place where he was to be put off. The conductor had the power to stop and receive any additional fare accruing for carrying the passenger to a point beyond the station to which his ticket entitled him to be carried. And as was said in the case above referred to, "if the passenger were to take fare for four miles, he would be bound to get the passenger off there." See 14 How. 468; 16 Id. 260, 469; 18 Id. 18.

The chief contest in the argument was whether the court was in error in using the word "could" in the charge instead of the word "might," as he was requested. The charge, in substance, was that the cars should have been stopped or "slacked up," so that plaintiff "could get off in safety." The court was requested to charge, that if the train did slack up so that plaintiff "might have gotten off safely, then, although plaintiff was injured in getting off, defendant is not liable." The court used the proper term. "Could" rather implies *was possible, within the limits of chance.*

This case reported on p. 348, *ante*.

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"Could" more strongly signifies *was able, had the power* tainly a conductor has not discharged his duty who so cl speed that it is possible for a passenger to get off safely whether I am right or wrong in this criticism or explanation these two potential mood prefixes, which are often indiscrimin used, the difference between the two is hardly potential enough to constitute a legal error sufficient to set aside a verdict, reverse judgment and grant a new trial.

3. The second request to charge made by defendant is also obnoxious to the criticism already made on the word "in this connection. But it goes farther. It is that "if the slacked up so that plaintiff might have gotten off safely, it is his duty to determine whether he would get off or not, and if he got off, and in so doing was injured, he is not entitled to recover. The conductor was standing close by, he saw plaintiff and his friend he was traveling with standing on the steps of the car to get off. That friend did get off. The cars were still in motion and did not stop. The conductor neither gave warning nor slacked off, or notice that the cars would stop or still further slacked off, in fact, he knew the cars would not stop. The passenger took his only chance he had. He tried to follow his friend, the conductor standing by. All this makes a case as strong as that of *Georgia Railroad Co. v. McCurdy, supra*, and we do not see anything that calls for a reversal of the judgment of the court below.

Judgment affirmed.

MONTGOMERY AND WEST POINT RAILROAD COMPANY v. BORING.

Supreme Court, Georgia, January, 1874.

[Reported in 51 Ga. 582.]

GROSS NEGLIGENCE TO STOP A TRAIN FOR A LENGTHY TIME OVER AN OPEN DITCH IN THE NIGHTTIME.—A railroad company stopped its train from half an hour to an hour at nighttime, to await the arrival of another train, over an open ditch or eight feet deep, at the bottom of which were rocks and timber, and no stationary lights there, which ditch was known to the conductor but unknown to a passenger who stepped out of the car and fell into the ditch and was injured, the evidence of negligence on the part of

ad company was so strong and uncontroverted that the jury were found to find for the plaintiff irrespective of an error in the charge of the court, and a new trial was not granted.

In such a case a verdict for \$10,000 was not excessive.

OM Troup Superior Court. The facts appear in the opinion. W. HAMMOND & SON, for plaintiff in error, cited: Acts of Felix v. State, 18 Ala. ; 1 Gr. on Ev., §§ 63, 64, 66; 2 B. & 756; 12 East, 452; 1 B. & B. 538; 12 Wall. 65; 1 Black. 5 Blatch. 317; Berry v. M. & W. R.R. Co., 39 Ga.; 1 Ch. 396, 397; 2 Gr. on Ev. §§ 254, 256 and cases cited; Code, 44, 3070, 3072, 3073, 3074, 3248, 3560; Wallace v. Clay- 42 Ga. 443; M. & W. R.R. Co. v. Davis, 18 Id. 680; en v. Verdell, 42 Ga. 537; Stephenson v. State, 40 Id. Phillips v. Williams, 39 Id. 602; Whitely v. State, 38 Id. 3; Horne v. State, 37 Id. 93; Scott v. Winship, 20 Id. Hunter v. State, 43 Id. 484; Grant v. State, 45 Id. 477; son v. Wright, 48 Id. 648; S. R. & D. R.R. Co. v. Lacy, a. 461; 18 Ga. 679; 19 Id. 437; 29 Id. 358; 28 Id. 93; 105; 38 Id. 409; 42 Id. 327; 56 Penn. St. 294; 7 Allen, 11 Ga. 257, 634; 12 Id. 512, 522; 15 Id. 399; 25 Id. 43 Id. 372; 17 Ga. 446; 30 Ga. 133; 2 Redf. on Railw. P. R.R. v. Zebe, 33 Penn. St. 318; Shear. on Railw. 321, 4 Cush. 400; 26 Iowa, 124; 56 Mo. 234; 51 Penn. St. 3 Exch. 533; 81 E. C. L. R. 178; 95 Id. 923; 115 Id. 184. H. HILL & SON, LESTER & THOMPSON, for defendant, Acts of 1837, p. 201; 39 Ga. 504; 12 Wall. 650; 37 01, 410, 419; Code, §§ 1686, 2067, 3068, 3070; 28 N. H. Iowa, 124; Shear. & Redf. on Neg. 391; 2 Pars. on Con. i, 220.

ner, Ch. J.—The plaintiff brought an action against the ant as a common carrier of passengers on its road, to r damages for an alleged injury caused by the negligence defendant. On the trial of the case, the jury, under the of the court, returned a verdict in favor of the plaintiff for 0. A motion was made for a new trial on the several ls as specified and set forth in the record, which was over- y the court, and the defendant excepted. It appears from dence in the record that the plaintiff is a citizen of this and a physician of thirty years' standing; that he took

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passage on the defendant's road at Columbus, Georgia, to be carried to West Point, Georgia, on his way to his home in Atlanta, Georgia, and paid the usual customary fare for such carriage. That at Opelika, in the State of Alabama (it being the night between Columbus and West Point), it had to wait for the Montgomery train from half an hour to an hour before the passenger changed cars going to West Point. Whilst the defendant's car was standing on its track thus waiting for the Montgomery train to arrive on its way to West Point, the plaintiff had occasionally stepped out of the car, and, in doing so, he fell into a ditch or some nine or ten feet deep below the step of the car, and broke his leg and was otherwise injured. The car was standing at or near the usual place of receiving and putting off passengers; there were stationary lights, there were rocks, timbers and oyster shells on the bottom of the ditch into which he fell. Plaintiff used care and caution in going down the car steps, and when he stepped on the last car step expected to put his feet on the ground instead of stepping into the open ditch, of which he had no knowledge at the time, it being dark. The defendant's conductor of its train had known of the existence of the ditch for three years; it had since been covered.

1. Objection was made at the trial to the form of the act of the plaintiff averring that the Montgomery and West Point Railroad Co., otherwise called the Western R.R. Co., had damaged him, &c. The court overruled the objection, and held that the latter averment was surplusage, and need not be proved; that the suit was against the Montgomery and West Point R.R. Co. There was introduced in evidence by the defendant the acts of the general assembly of the State of Alabama authorizing a surrender of the charter by the stockholders of the Montgomery and West Point R.R. Co. and its incorporation into the Western R.R. Co. of Alabama, for the purpose of showing that there was not in the State of Alabama, at the time of the injury complained of, such a corporation as the Montgomery and West Point R.R. Co. The evidence in the record in relation to this point in the case, is that the company running the railroad from Montgomery, Alabama, to West Point, Georgia, and from Columbus, Georgia, via Opelika, Alabama, under whatever name it had, regularly and exclusively used the depot called the Montgomery and West Point R.R. de-

Point, and kept its agents in said depot, and still does so. General assembly of this State, in 1837, passed an act incorporating the stockholders of the Montgomery Railroad Company, and such as might thereafter become stockholders in said company, by the name and style of the Montgomery and West Point Railroad Company, within the corporate limits of the town of West Point, and authorized said company, in its corporate capacity, to purchase, receive, possess, enjoy and retain to them and their successors, so far as shall be necessary for the location of the road, and for the construction of the necessary buildings, etc., the same to sell, demise, alien, or dispose of; and to sue and defend, plead and be impleaded, answer and be answered, defend and be defended against, in any courts of record in this State. A section of the act declares that this corporate body and its successors, shall exist and continue for fifty years after the completion of said Montgomery and West Point R.R. The 3d section of the act declares that all bills, writs, processes of whatever kind, known to the laws of this State, may be served upon the company, by leaving a copy thereof at the depot of said company, by the sheriff, constable, or other officer authorized to serve process. By this act the Montgomery and West Point Railroad Company were incorporated as a body politic in this State, with the same defined rights and privileges, on condition that it should be liable to be sued in the courts of this State by her own citizens, in the same manner as other incorporated companies were liable to be sued by them, and service of process for that purpose might be made on it by leaving a copy thereof at its depot, which it was authorized to construct in this State. There was no other provision made than this liable to be sued for an injury done by it to its citizens, which the courts of this State could recognize.

The Western R.R. Co is nothing more than the successor of the corporate body created by the act of 1837, either by contract or operation of law, so far as the rights and privileges, duties and responsibilities granted and imposed by that act are concerned, as respects the citizens of this State. If proceedings had been brought in the courts of this State to forfeit the charter of the Montgomery and West Point Railroad Company for non-user, on the statement of facts set forth in the record, could not the Western R. Co. have successfully replied that it was the successor

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of all the rights and privileges granted to the Montgomery and West Point Railroad Company, under the act of 1837, and as such successor, it had continued in the exercise of the enjoyment of such rights and privileges up to the present. If the Western Railroad Company is the successor of the rights and privileges granted by the State to the Montgomery and West Point R.R. Co. by the act of 1837, then it necessarily follows that it is subject to all the liabilities imposed by that act for the protection of the rights and interests of the people of this State. The position assumed on the argument, if sound, would seem to operate greatly to impair, if not destructive of the rights of the Western Railroad Co. to the enjoyment of the rights and privileges granted by this State to the Montgomery and West Point R.R. Co. by the act of 1837. As a matter of course, it cannot expect to enjoy the privileges conferred by that act without incurring the liabilities imposed by it. We find no error in the rulings of the court in relation to the right of the plaintiff to maintain his action against the defendant in the courts of this State for the injury complained of.

3. We find no error in the charge of the court as to the measure of damages. The court stated the rule correctly between general and special damages, and charged the jury that special damages must be proved in order to be recovered, and that damages must be the legal consequence of the act, but not its legal or natural consequence, a remote and contingent. The charge of the court as to the limitation of damages restricted the jury to such damages as resulted from the injury, and excluded speculative and imaginary damages.

4. The court also charged the jury that if they believed the evidence that certain enumerated facts had been proved, without expressing or intimating to the jury whether such enumerated facts had or had not been proved, then the defendant would be guilty of negligence. This charge of the court, in stating to the jury, as a conclusion of law, that certain facts, if proved, constitute negligence, was error. Negligence is a question of fact which the jury are to judge from the evidence, and not a question of law. When negligence has been proved to the satisfaction of the jury, certain legal consequences result therefrom; but it is the province of the court to tell the jury that any given set of facts amount to negligence.

5. If the defendant was negligent, the law declares what shall be the result thereof, and the inquiry is, does the evidence in this record show such a negligence on the part of the defendant as would have required the jury to have found a verdict in favor of the plaintiff, wholly independent of the charge of the court? In our judgment, the evidence of negligence on the part of the defendant is so strong and uncontroverted, that the jury were bound to find for the plaintiff irrespective of the error in the charge of the court on that question. The defendant stopped its train on its track from half an hour to an hour, in the nighttime, to await the arrival of its other train to convey its passengers to their destination, over an open ditch, six or eight feet deep, at the bottom of which were rocks and timbers, with no stationary lights there, which ditch was known to the defendant's conductor, but not known to the plaintiff when he stepped out of the car, as he had the right to do, under the circumstances; he was precipitated into this pitfall, had his leg broken and crippled for life. What other verdict could the jury have rendered in this case under the evidence as to the defendant's negligence? If the evidence as to the defendant's negligence had been *doubtful* or *conflicting*, we might have felt it to be our duty to grant a new trial for the error of the court in its charge upon the question of negligence.

It has been insisted that the amount of the verdict is excessive, and ought to be set aside for that reason. Whilst this court will always be careful to protect the rights of railroad corporations against colorable and unfounded claims, and against excessive damages founded on such claims, still, when from gross negligence, as in this case, the lives and safety of passengers are exposed to danger, and injury results therefrom, it will not interfere with the verdict of a jury, except when it is apparent that the verdict is so unreasonable as to induce the belief that it was the result of passion or prejudice. In view of the facts of this case, as disclosed by the record, we are of the opinion that the verdict of the jury should not be disturbed.

Let the judgment of the court below be affirmed.

STILES v. THE ATLANTA & WEST POINT RAILROAD.

Supreme Court, Georgia, September, 1880.

[Reported in 65 Ga. 370.]

PERSON NOT A PASSENGER STEPPING OFF PLATFORM CAR NOT AT STATION AND INJURED CANNOT RECOVER.

—Where it appeared from the evidence that a passenger train was stopped before it reached the depot and platform where passengers were discharged and received, until two freight trains in front were moved out of the way, and the plaintiff went up the track and boarded the train in search of his wife and child, who were passengers, and failing to find them in the one car, he intended to search another car that was separated from the first car he was in by an unlighted car, and in stepping off the platform between the unlighted car he fell into a culvert fifteen or twenty feet deep, in which he could not see on account of the darkness of the night, and was injured, the company was not liable therefor, although it appeared that the lights in the car had been blown out by drunken and disorderly passengers.

FROM Troup Superior Court. The facts appear in the opinion of the court. **FERRELL & LONGLEY, BIGHAM & WHITAKER**, for plaintiffs in error.

COX & SPEER, for defendant in error.

Hawkins, J.—C. A. Stiles brought his action for damages against the defendant, the Atlanta & West Point Railroad Company, in Troup County, on the 27th of October, 1879. He claimed \$15,000 damages, and alleged in his declaration that on the day of August, 1879, at the depot of defendant, in La Grange, Georgia, in said county, he bought a ticket for his wife and child, only four years old, to be conveyed to the city of Atlanta and return on said day. He put his wife and child aboard said train and was then informed by the officers in charge of the same that said train would return the night following said day, and when it did return as stated, with Pierce Mims as the conductor, at twelve o'clock on said night, and instead of pulling up to the usual place of receiving and discharging passengers on the south side of the depot in said city, the train, by order of said conductor, stopped at the north of said depot. He boarded the train in search of his wife and child, and passing through said train without finding them, passed into the next ladies' car, which

ed with ladies and children, and in which there was no
The night was very dark. Petitioner passed nearly half
through said car, and on inquiry found his wife not there.
ep off the children, he retraced his steps to go on the next
ot knowing that defendant had stopped its car immediately
n open culvert twenty feet deep. In descending from the
he fell in the culvert, inflicting serious injuries, etc. He had
nowledge of the existence of the culvert at the time. By
of said injuries he suffered great pain, was permanently
d, and, as a physician, deprived of the power to pursue his
sion.

this action defendant pleaded not guilty, and that the injury
caused, not by any negligence of the defendant, but by the
imprudence and negligence of the plaintiff.
rial resulted in a verdict of one thousand dollars for the
ff.

evidence was, in substance, about as follows: The defend-
advertised an excursion trip to Atlanta on the twenty-second
of August, 1879, and return. The plaintiff bought tickets
s wife and child four years old, and in the morning assisted
on board the excursion train bound for Atlanta. The train
ted of many coaches and a great crowd of passengers. On
turn trip the train was much crowded with men, women
children, and many of the men were drunk. The train was
ed on its return, near the depot (some 360 yards) at La
e. The night was warm, drizzling and very dark when the
reached a place on its track 360 yards from the depot and
rm where passengers were discharged and received. It was
ed by the officer in charge of the train on account of two
t trains in front, discharging freights, being on the track,
y preventing further movement of the excursion train until
eight trains were moved. Under the steps of one of the
ger coaches was an open culvert twenty feet deep, con-
ed and used in the ordinary way by said railroad company.
ff went to the depot to meet his wife and child and be their
from thence home. The train was delayed, and finding
e train containing his wife and child was standing in the
of the freight trains, and they were still delivering freights,
anxious about his wife and child, and seeing many persons

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coming from said train, he went up the railroad track to where said train was standing, and boarded the train in search of his wife and child, went through one car, then on through another, and found no lights in first car, none in second. Inquired for his wife, and was told that she was not in that car; retraced his steps, went on to the top of the car, stepped off bottom step and fell into the culvert fifteen feet deep, receiving severe injuries, etc. Did not go on the excursion; knew where the depot and platform were where passengers were received and discharged; wife and child not hurt; no one hurt on train, and nothing unusual or extraordinary had occurred.

The evidence also showed that the train on its return was not crowded, many drunken men on board the same, who blew out the lights; the train was provided with lamps and candles; the night was warm, and though all efforts were made to keep the windows down and lights burning, they were constantly blown out by drunken men and the wind.

The evidence also showed that when the train stopped the conductor cried out to passengers, "Don't get out; we are not at the depot yet." One witness said someone said get out, but the plaintiff did not hear that.

After verdict for plaintiff for \$1,000, a motion was made for the railroad company for a new trial, upon the ground that the evidence was not sufficient evidence to support it, and various other grounds.

The judge granted the new trial upon the sole ground that the evidence was not sufficient in law to sustain the verdict, and therefore, the same was contrary to law, and this is the error complained of by the plaintiff.

It is written in our law that a carrier of passengers is bound to exercise "extraordinary diligence in behalf of himself and his agents to protect the persons and lives of his passengers." See Code, § 2067.

"Extraordinary diligence is that extreme care and caution which every prudent and thoughtful person uses in securing and preserving their own property." Section 2062.

"A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotive or cars or other machinery of such company, or for damage done by any person in the employment and service of such company."

unless the company shall make it appear that these agents exercised all ordinary and reasonable care and diligence—presumption in all cases being against the company." See

3033.
constitutes extraordinary diligence and ordinary care are questions of fact, often complicated and involved in intricate discriminations, determinable alone by the searching analysis of intelligent jurors. Here our law leaves the question under established rules of law.

Our law does not make a railroad corporation liable for the negligence, want of care, or recklessness of other persons. No one can recover damages from another for an accident or an injury caused by his own negligence.

Section 3034, provides that no person shall recover damages from a railroad company for injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence; and if the complainant and the company be both at fault, the former may recover, but the damages shall be apportioned by the jury in proportion to the amount of fault attributable to him.

Interpreting these sections of our Code as enactments *in pari materia*, it would seem that no action can be maintained against a railroad company where the plaintiff could have avoided the injury complained of by the exercise of ordinary care (see Code, § 3034), and this would be true, although contributory negligence on the part of the company would be an element in the case. That is to say, where the injury complained of was caused by the negligent running of the locomotive or cars of the company. Yet if the plaintiff consented to the same, or was injured through his own negligence, or could have avoided the injury by the exercise of ordinary care, then he could not recover, upon a well settled principle of right and law that no person ought to be mulcted for damages by the fault, negligence or recklessness of another.

In this case it appears that the plaintiff went to the depot at a certain time to meet his wife and child on the return of the passenger train. Finding the train some three hundred and sixty feet below the depot, he went thither, boarded the train, and, with the aid of his wife, stepped from the cars into the culvert, where the injury occurred.

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It may be conceived that when at the depot at La Grange the plaintiff met his wife and child, the plaintiff had all the rights of a passenger aboard the train, for the purpose of receiving and assisting his wife and child from the train, and any injury received by him in the duty or desire of assisting his wife and child from the train, would be redressable at law in the absence of negligence on his part. (1) But when he left the depot and place for deposit of passengers, and went on and up the track of defendant's train in the dark to meet his wife and child, and whilst the machinery of the defendant was absolutely still and not in motion, and entered the train in search of his wife and child, and while so looking for them stepped from the cars into the culvert, receiving the injury complained of, we cannot see how the defendant can be liable for the apparent accident. His desire to meet and assist his wife and child was praiseworthy, but in no sense could the defendant be charged with responsibility as to his movements in approaching, entering or leaving its train, then not in motion and only waiting for the removal of the freight trains to deliver the passengers at the depot.

The court below thought the evidence did not authorize the verdict, and we see no abuse of its discretion in granting the new trial.

Judgment affirmed.

ALIGHTING FROM MOVING TRAIN—EXCESSIVE SPEED.—In an action to recover for injuries sustained while alighting from a moving train, it was *held*, that where one enters a moving train for the purpose of riding thereon, and by the rules and regulations of the company passengers were not allowed to ride on the outside of the trains, it would be his duty to leave the train as soon as he prudently could, when notified of such rule; and that where one leaps from a train of cars moving at the rate of fifteen miles per hour, without advice or concurrence of the conductor, his right to recover would involve the question whether he prudently used the only means provided by the company for him to get off, that the course of the train was permitted him to use, and also his recklessness and want of

1. This *dictum* is restricted in *Coleman v. Ga. R.R. Co.*, 84 Ga. 1, 4, 2 Am. Neg. Cas. 429, to persons who are on board with the knowledge of those

agents or servants of the company whose diligence is charged with the safety.

ry care; for if by the use of ordinary care he could have
d the injury, the company would not be liable.
uch action, where the damage alleged was the breaking of
g of the plaintiff, resulting in permanent injury, and the plaintiff
twenty-one years of age, realizing from \$200 to \$300 for four
s, and being deprived thereafter of employment, a verdict for
3 was held excessive.—*Supreme Court, Georgia, September*
1880. **SOUTHWESTERN RAILROAD v. SINGLETON,**
252. (1)

THE SOUTHWESTERN RAILROAD v. SINGLETON.

Supreme Court, Georgia, September, 1881.

[Reported in 67 Ga. 306.]

N PERSON IS INJURED PRESUMPTION IS AGAINST RAIL-
ROAD. —Whenever a person is injured by the running of railroad cars
this State, the presumption is that the company is at fault, and the
onus is upon it to show that it was not at fault.

ON JUMPING OFF MOVING TRAIN WHEN DIRECTED TO
DO SO.—In an action for injuries where it appears that the plaintiff,
who had purchased a ticket, had entered the wrong train as it was about
moving off, and after being told by the company's agent, that unless he
paid an exorbitant fare he would have to get off, and he jumped off while
the train was in motion and broke his leg, it was error to charge that the
plaintiff should have been given sufficient time and a reasonable oppor-
tunity to have gotten off in safety, and such was not afforded so long as
the train was in motion, and it was also error to charge that if railroad
companies would put a person off a train they must stop it or they would
be responsible for the injuries sustained.

ORDER TO GET OFF A TRAIN HAS THE SAME EFFECT AS
FORCE.—Although a mere direction to get off a train, or even a com-
mand, does not amount to force, yet if a passenger acted under the fear
of it, the effect upon his mind would be the same, and he can recover for
injuries sustained in obeying the order.

RAILROAD COMPANY GUILTY OF NEGLIGENCE.—Although
the plaintiff should have gotten off when first notified, if he could have
done so in safety, and he was in fault by not doing so, the company was
not in fault in causing him to get off when it was not safe to do so, and
in being a case of contributory negligence, the plaintiff could recover.

See, also, the case next reported.

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FROM Talbot Superior Court. The facts appear in the charge of the trial court was as follows :

"This is a suit by W. C. Singleton against the South R.R. Co. for damages alleged to have been sustained by the running of the cars of said company. A railroad company shall be liable for any damage done to person, stock or property by the running of the locomotive, or cars, or machinery of such company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised ordinary and reasonable care and diligence, the presumption in all cases being against the company. Code, § 3033. So we see, from the reading of this section, that whenever a person is injured by the running of the railroad cars in this State, the presumption of law is that the company is at fault, and the burden is upon them to show that they, or their agents, were not at fault. No person shall recover damages from a railroad company for injury to himself when the same was done by his own negligence caused by his own negligence. If the plaintiff and the agent of the company are both at fault he may recover, but his damages shall be diminished in proportion to the amount of default attributable to him. A railroad company in this State, providing sufficient cars to accommodate all the traveling public over its road has the legal right to run special trains over its road for the purpose of carrying provisions and paying its employees, and shall not prohibit any person from traveling on such train, and if the plaintiff entered a car attached to the same, knowing its character, without the consent of the corporation or its agents, he becomes a trespasser. But notwithstanding a man may be a trespasser on a train, and the agent of the company have the right to put him off, yet they must use ordinary diligence in doing so; and if they do not use ordinary diligence in putting him off, or causing him to leave the train, and he is injured thereby, then the company would be liable to him for damages, notwithstanding he may be a trespasser. Ordinary diligence is that care which any prudent man takes of his own property of a similar nature. Code, § 3033. But, gentlemen, if the plaintiff purchased a ticket of said company, authorizing him to ride upon the train provided for the company for transporting passengers, and boarded this

tion train, believing that he had the right to ride upon the—believing honestly that it was a train for the transportation of passengers—then he was not a trespasser until after he had been notified of his mistake, and had had sufficient time and a reasonable opportunity to have gotten off in safety; and a reasonable opportunity is not afforded so long as the train is in motion. If the road companies would put a person off their train they must not leave him on their train, otherwise they would be responsible for damages, and any injury result from the transaction. If a person is ordered to get off or jump from a moving train, while he may be at fault in obeying the order, yet, if in obedience to said order he jumped from the train and is injured, the company will be liable, but the damages should be diminished by the jury in proportion to the fault attributable to the plaintiff. Provided you believe the plaintiff was at fault in jumping at the time, if injury is sustained by such person whilst so wrongfully upon such special train, the fact of being on such train will be an element in determining the negligence and want of care, and the liability of the corporation. If a person enters a pay train for the purpose of riding thereon, and by the rules and regulations of the road passengers were not allowed to get on said train, it would be his duty to leave the train as soon as he could prudently do so, when notified of such rule. If one jumps from a train of cars running at the rate of fifteen miles an hour without the advice or concurrence of the conductor, his right to recover would involve the question whether he prudently used the means furnished by the company for him to get off that the company permitted him to use, and also his recklessness and want of ordinary care, for if by the use of ordinary care he could have avoided the injury the company would not be liable. If you should believe from the evidence and law that the plaintiff is entitled to damages in this case, then in ascertaining the amount of damages you may look to all the facts and circumstances connected with the transaction. Was the plaintiff at fault? what was the character of the injury—the extent of the injury? was it permanent or temporary? what was the condition of the health of plaintiff before and after the injury? what was his capacity for business before and after the injury and making support? was he less capable for business and making a support than before? if so, how much less, and if there were any

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changes in these respects, were they the result of this injury these things may be looked into in making your verdict."

At the request of defendant's counsel, the following was in charge also: "The fact that this is a suit by an individual against a corporation does not in the slightest degree affect the question of damages. The legal principles governing the award and the damages given by the jury (if any) should be the same no more, no less, than should be given if the suit was against an individual. Damages are given as a compensation for injury done, and generally this is the measure, where the injury is of being estimated in money. This is not a case for punitive damages. A passenger on a proper train would not be justified in jumping from a moving train of cars, simply to avoid the amount of fare demanded, even though the amount is exorbitant and unjust." The court added at this point: "If the plaintiff refused to pay said exorbitant fare when the conductor ordered him off of the train, and in obedience to that order he did jump from the train, the company would be liable but the damage should be diminished in proportion to the fault of default attributable to him if you believe he was at fault."

W. S. WALLACE and PEABODY & BRANNON, for plaintiff, in error.

BLANFORD & GARRARD, MILLER & BUTT and E. M. BROWN, for defendant in error.

Crawford, J.--This was a suit for damages brought by the plaintiff against the defendant in error, against the Southwestern Railroad Company to recover for injuries sustained in getting off of one of its trains. The facts substantially were, that the plaintiff bought a round trip ticket from Howard to Geneva and back; that when he took he entered the pay train, which was about moving, and as he walked in he met a negro who told him that the paymaster was in the next room; saw no seats; went to where the paymaster was, who asked him where he was going, and he said Howard; paymaster told him that it would cost him one dollar a mile to ride on that car; his reply was that he could not pay that much and will get off," and he was told to step out, and

door beside him, but he went to the rear of the car and
d off there, breaking his leg. He laid his damages at twenty
nd dollars.

pleas of the defendant were the general issue; that the plain-
s injured by his own carelessness; that he was not a pas-
senger, but an intruder; was notified in due time to get off;
and to do so until it was hazardous to jump, and that the
injury was the result of his own misconduct.

The jury gave for his damages \$5,000. A motion for a new
trial was made on the following grounds, to wit:

"Because the court charged the jury as follows: 'A railroad
company shall be liable for any damages done to persons, stock,
or property, by the running of the locomotive, or cars, or
machinery, of said company, or for damage done by any
person in the employment and service of such company, unless the
company shall make it appear that their agents have exercised all
ordinary and reasonable care and diligence, the presumption in
such cases being against the company. So you will see from the
language of this section of the Code that whenever a person is
injured by the running of the railroad cars in this State, the pre-
sumption of law is that the company is at fault, and the *onus* is
on them to show that they and their agents were not at fault.'"

"Because the court charged the jury as follows: 'But, not-
withstanding a man may be a trespasser on a train, and the agent
of the company have the right to put him off, yet they must use
ordinary diligence in doing so; and if they do not use ordinary
diligence in putting him off, or causing him to leave the train, and
he is injured thereby, then the company would be liable to him
for damages, notwithstanding he may be a trespasser.'"

"Because the court charged the jury as follows: 'If this
plaintiff purchased a ticket of said company, authorizing him to
ride upon the trains provided by said company for transporting
passengers, and boarded this pay or provision train, believing he
had a right to ride upon the same, believing honestly that it was
for the transportation of passengers, then he was not a
trespasser until after he had been notified of his mistake, and had
sufficient time and reasonable opportunity to have gotten off in
safety; and a reasonable opportunity is not afforded, so long as
the train is in motion.'"

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4. "Because the court charged the jury as follows: 'If companies put a person off of their train, they must stop the train, otherwise they would be responsible for damages if any resulted from the transaction.'"

5. "Because the court charged the jury as follows: 'If a person is ordered to get off, or jump from a running train, while he is at fault in obeying the order, yet if in obedience to said order he jumps from the train and is injured, the company is liable, but the damages should be diminished by the jury in proportion to the default attributable to the plaintiff, provided they believe he was at fault in jumping at the time.'"

6. "Because the court erred in not giving in charge the following written request of defendant's counsel: 'If the paymaster ordered this train to stop, and the plaintiff was ordered to get off, or jump off the train, and in obedience to this order he did leap from the train while it was moving at a rate of speed that made it hazardous for him to do so, it would be such an act of carelessness on the part of the plaintiff as would prevent a recovery, even though you believe that the company was at fault.'"

7. "Because the court erred in not giving in charge the following written request of the defendant's counsel: 'If a man is ordered by the conductor to jump off a train while the rate of speed is such as to make it hazardous for him to do so, and he knew it to be hazardous, or might have known it to be so, it would be the duty of such person to remain on the train until the train stopped, or the speed slackened as to make it safe for him to get off, and if he jumped off while the speed was such as to make it hazardous for him to do so, it would be imprudent for him to get off, and he knew it to be dangerous, or might have known it by the exercise of his reason, he is not entitled to recover.'"

8. "Because the court erred in refusing to give in charge the following written request of defendant's counsel: 'If you find from the evidence that Singleton entered a pay train and was ordered to get off, and in obedience to orders of the paymaster he jumped from such train while the rate of speed at which the train was moving made it hazardous or dangerous for him to jump, and he knew it to be dangerous or hazardous for him to do so, it would be such an act of carelessness on the part of the plaintiff as would prevent a recovery, even though you believe that the company was at fault.'"

that he had known it to be hazardous if he had exercised his powers, he cannot recover.' "

"Because the court erred in refusing to give in charge the following written request of defendant's counsel: 'If force was used by the company, or its agents, in getting the plaintiff off the train, then he would be entitled to recover, but a mere direction or even a command to get off would not be force. Force is something more than mere words. Words in no case amount to force, unless accompanied with violence, or threats of violence, when addressed to a person of full age and sound mind.' "

"Because the court erred in refusing to give in charge the following written request of defendant's counsel: 'It is the duty of a person about to enter a train of cars, if he does not know the character of the train it is that he is about to enter, to make inquiry as to whether or not it is a train that carries passengers. And if he enters without making inquiry and is injured in getting off, he cannot recover, if there was no force or violence employed or threatened toward the passenger by the company or employee of the company in charge of the train.' "

"Because the court erred in not giving in charge the following written request of defendant's counsel: 'If the plaintiff in this case entered a provision or pay train, and while the cars were moving slowly, so that he could have gotten off without danger of injury to himself, and he was notified that he could not ride on that train, to get off, it was his duty to do so at once; if he remained on the train until the rate of speed at which the train was moving made it dangerous or hazardous for him to get off, then he should have remained on the train; and if he did get off from such moving train and broke his leg, he cannot recover damages.' "

"Because the court erred in refusing to give, without qualification, the following written request, and in the qualification given: 'A person on a proper train would not be justified in getting off from a moving train of cars simply to avoid paying the amount of fare demanded, even though the amount of fare demanded was exorbitant or unjust.' The court added: 'But if the plaintiff refused to pay such exorbitant fare, and the conductor commanded him to get off, and he did get off in obedience to such command, then the defendant would be liable, but his

damages should be diminished in proportion to the amount of fault attributable to him, if he was at fault."

Upon the hearing of the motion for a new trial the same was refused, and the movant assigns error thereon.

1. Upon the first ground of the motion the court holds that under the facts in this case, the charge was a proper one and should have been given. The cars were running when the accident occurred, and the company should have been held to the rebuttal of that presumption which the law puts upon it.

2. The language of the charge in the second ground—in the words, "have the right to put him off, yet must use ordinary diligence in doing so, and if they do not use ordinary diligence in putting him off," and he is injured thereby, the company would be liable, were used, is not, we think, under the facts as disclosed by the record, such as should have been used, because they bore so closely on assuming that the plaintiff had been put off, that the jury might have inferred that the judge considered it a proper fact, whilst there was no pretense that such was the case.

3. The error complained of in this ground is that the matter was settled that should have been referred alone to the jury. He instructed them that if the plaintiff entered this train by mistake, he was not a trespasser until notified of his mistake, and given sufficient time and reasonable opportunity to have gotten off in safety, and a reasonable opportunity was not afforded so long as the train was in motion.

The question as to what would and what would not be a reasonable opportunity for the plaintiff to have gotten off the train in safety, was taken from the jury and settled by the court. To instruct the jury that a reasonable opportunity was not afforded so long as the train was in motion, was to pass upon a fact which the judge is forbidden to do. Besides, to say that a reasonable opportunity is not afforded so long as the train is in motion may or may not be true, because motion may be so slow as to be almost imperceptible, and yet going on; or it may be so rapid as to be scarcely to be seen before the object has passed beyond the plaintiff's reach.

4. In this ground is repeated the objectionable part of the second, in that the implication is so strong in the language used to impress the jury that it was a fact that the plaintiff was ac-

the defendant's train. The judge says: "If railroad company would put off a person from their train, they must stop the train, otherwise they would be responsible for damages, if any resulted from the transaction."

The plaintiff had not been put off the train, then to state such by hypothesis was to state one unauthorized by the proofs. There is a much stronger objection to this charge than that, that the province of the jury invaded when the judge tells that the train must stop, or else if any injury results that the company would be responsible for damages. This was a statement from the bench of negligence on the part of the company and limited the jury in its finding only to the question of damages. The authorities are almost without exception, that the question of negligence is one for the jury and not for the court, and the decisions of this court are so without exception. It was admitted that the train did not stop, and it was not denied that the plaintiff was injured; therefore, when the judge told the jury that if railroad companies would put a person off their train, they must stop the train, otherwise they would be responsible for damages if any injury occurred from the transaction, the judge was left them but to write out the damages.

This has not been an open question since it was ruled in 34 Ga. 37, where the court say that "the jury alone have the right of determination of this question . . . If it had been a fact that the axle was too short, . . . and that was the cause of the accident, certainly the judge had no right to determine that it constituted negligence." In 56 Ga. 459, the judge below requested to charge the jury that "the failure to keep the track of way clear of bushes was negligence." Upon his refusal the court say: "The question of negligence is for the jury, and not for the court. Had this charge been given, it would have been taken from them and been controlled exclusively by the court." So that, in this case, when the judge said that not only the train was not to afford a reasonable opportunity for the plaintiff to get off in safety, it was deciding what was and was not a reasonable opportunity for a safe departure from the train. It was a question of fact, not of law, and should have been left to the jury.

The fifth ground of complaint we construe to mean that if

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the conductor was at fault in ordering the plaintiff off the train whilst in motion, and the plaintiff was also at fault in obeying the orders, that it would then make a case of contributory negligence, but the company would nevertheless be liable. Such being the construction of it, we do not consider it error.

6. There was no error in refusing to give this charge, but to have given it would have been an expression of opinion on the act of the plaintiff. To specify just what he had done, and to tell the jury that it was such an act of carelessness as would prevent his recovery, was to say that he was in fault, and if so the company would not be liable, whilst he might recover, both were in fault.

7, 8. These requests to charge leave out of view any fault of the plaintiff to recover, although he might have taken the risk of the leap, and yet did it under orders that should not have been given, with a rate of speed making it hazardous for him to attempt it.

9, 10. These requests should not have been given, but whilst it is true that a mere direction, or even a command, would not amount to force, yet, if he acted under the fear of it, the effect upon his mind would be the same.

11. The objection to this charge is, that whilst it is true the plaintiff should have gotten off when first notified that it was a freight train and not a passenger train, if he could have done so in safety, if afterwards, although he was in fault by not doing so, the company or its agents were in fault in causing him to get off when it was not safe to do so, that, too, would make a case of contributory negligence, and the plaintiff could recover. This being ignored, of course the charge should have been refused.

12. The qualification by the court to this charge was not sufficient. Judgment reversed.

THE CENTRAL RAILROAD V. SMITH. (1)

Supreme Court, Georgia, October, 1882.

[Reported in 69 Ga. 268.]

ENGINEER STEPPING FROM MOVING TRAIN AT INVITATION OF CONDUCTOR MAY RECOVER DAMAGES FROM THE COMPANY.—In an action for injuries where the evidence for the plaintiff showed that he was a passenger on defendant's train and that defendant's agent agreed to let him off at a station for which he had bought a ticket; that because of the grade and the weight of the train the conductor asked the plaintiff to jump off when the train's speed was slackened, which the plaintiff consented to do, but that the speed of the train not being slackened, and plaintiff seeing he would be carried beyond the station, stepped from the car, but held fast to the railing, trusting the speed would be lessened as the conductor was on the platform and could have wished have pulled the bell-rope, but as he did not do so, the plaintiff, after being dragged some distance, had to loose his hold, fell and was injured, and a verdict was found for the plaintiff, the court *held*, that there was sufficient evidence to sustain it.

FROM Quitman Superior Court.

Plaintiff brought action against the Central Railroad, alleging that the defendant had injured and damaged him while operating and running the trains upon the Southwestern Railroad, the defendant having leased that road.

The sheriff made the following entry of service: "I have this executed the within writ by serving a copy thereof on R. T. [unclear], agent Central Railroad and Banking Company at George-

"The defendant demurred to the declaration because it did not show liability on the part of the Central Railroad, but if any liability was shown, it was on the part of the Southwestern Railroad because it did not appear that the president of the defendant had been notified of the bringing of this suit, nor that any complaint had been filed in the clerk's office, as required by section [unclear] of the Code; and also because the declaration failed to set out any sufficient cause of action. The demurrer was over-

"The evidence for the plaintiff was substantially as follows: "On

Cited in *Central R.R. Co. v. Whitehead*, 74 Ga. 441, 444, 2 Am. Cas. 384.

February 19, 1881, Smith purchased a ticket at Morris' on the line of the Southwestern R.R., which was leased Central R.R. for the purpose of going to Hatcher's Station in Quitman County, and for that purpose boarded the local train, to which was attached a cab, in which passengers were carried. Before leaving Morris' Station the conductor inquired of the station agent whether he had sold any tickets to Hatcher's Station or not. The agent replied that he had sold one to the plaintiff, to which the conductor responded that he was sorry he did not desire to stop at Hatcher's Station. Plaintiff then remarked that if the company allowed passengers to ride on the train, it was their duty to deliver them safely, and if their instructions were not to stop at a station, the conductor should not refuse a passenger to enter the cab. After the train had started the conductor came to the plaintiff for his ticket. The latter told him that he was a public carrier, and that the railroad company should be responsible for the damage that a passenger received. There was an up-grade at Hatcher's Station, and the train was a slow one. The conductor stated that if he stopped at the station he could not get over the grade, and would have to run back. Plaintiff replied that he could not help that, and that it was his business. When within about half a mile of Hatcher's Station the plaintiff informed the conductor that if it would be any accommodation he would not require the train to be stopped en route, but that the conductor might "slack up" enough for him to get off with safety. When within about a quarter of a mile of the depot the conductor inquired of the plaintiff whether he was willing to jump while the train was moving at that speed, to which the latter answered that he would not. The conductor told him that he would "slack up," and instructed him to be ready to get off. Plaintiff requested a friend to throw down a small package which he had, and then placed himself upon the bottom step of the car. When within a few yards of the depot the speed of the train began to increase very rapidly. Plaintiff, being compelled to attend court that day, was afraid that he would be carried beyond his station, and thereupon jumped from the train, but retained his hold upon the railing. Seeing the conductor standing upon the platform, he thought that he would pull the bell-rope and stop the train, but he did not do so, and

dragged for a short distance, plaintiff was unable to retain his feet, and fell to the ground. There was also evidence as to the extent of the injury sustained by plaintiff.

The evidence for the defendant differed from that for the plaintiff on the following material points: The conversation between the conductor and the plaintiff, in regard to stopping at Hatcher's Station, occurred before the train left Morris' Station. The plaintiff stated that the conductor need not stop the train for him; that he need only "slack up," and plaintiff would get off; that he had done so several times. On nearing the station, at a point where the train could be "slacked up" before stopping it, so that the plaintiff could alight with safety, the conductor put his head inside the door of the cab to order the brake put on. When he looked out again plaintiff had already jumped. The brake was put on, but, after seeing that plaintiff had jumped from the train, it was taken off again and the speed of the train increased. The effect of putting on the brake while on an up-grade is very considerable. The plaintiff was dragged a very short distance, and the bell-rope, being in the top of the cab, was out of reach of the conductor at that time. It was not the intention of the conductor or engineer to stop at Hatcher's Station unless there should be freight for them to take on at that point; but before the accident the engineer had shut off steam from his engine, in order to ask the station agent whether there was any such freight. This decreased the speed from about twelve or thirteen miles an hour to about ten miles an hour. When the brake was taken off, the engineer again put on steam and the speed was somewhat increased. Seeing that plaintiff had jumped and was walking towards the depot, the train was not stopped.

The jury found for the plaintiff \$800.

The defendant moved for a new trial on the following, among other grounds: 1. Because the court overruled the demurrer to the complaint. 2. Because the court erred in striking the special verdict of defendant on motion for plaintiff. 3. Because the court refused to dismiss the case for want of proper service. 4. Because the amount of damages found was excessive. 5. Because the verdict is contrary to law and the evidence. The motion was denied, and defendant excepted.

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S. C. ELAM, for plaintiff in error.

J. C. RUTHERFORD, J. H. GUERRY, for defendant in error.

Speer, J.—James E. Smith sued the Central Railroad and Banking Company for damages to his person, occasioned by negligence and want of ordinary care and diligence on the part of its servants in and about the running of its trains while he was a passenger thereon. To this action the defendant below demurred on account of want of sufficient service, and because no cause of action was sufficiently set forth. The demurrer being overruled, the defendant filed the plea of general issue and also a special plea.

A verdict was returned in favor of the plaintiff for the sum of \$800 as damages. Defendant made a motion for a new trial on various grounds, which was overruled.

1. As to the question of service made, we think it was not made adversely to plaintiff in error in the case of *Ga. Southern R.R. Co. v. Bigelow*, 68 Ga. 612.

2, 3. There was a sufficient cause of action set forth in the plaintiff's writ. There is no special plea to be found in the record, and we cannot pass upon the error assigned on its being struck out by the court.

4. We think there is sufficient evidence to sustain the verdict, and see no good cause of complaint that it is excessive. Looking at the facts, as they appear in the record, we think the law was applied in the case was ruled by this court in the cases of *Ga. R.R. Co. v. Curdy*, 45 Ga. 288 (1), and *Western R.R. Co. v. Young*, 51 Ga. 489 (2). Under these rulings the facts of this case make the defendant liable.

Judgment affirmed.

WESTERN AND ATLANTIC RAILROAD WILSON, BY NEXT FRIEND.

Supreme Court, Georgia, September Term, 1883.

[Reported in 71 Ga. 22.]

INFANT INJURED WHILE BOARDING A MOVING TRAIN.

Where a minor, at the invitation of an employee of a railroad company, was injured while boarding a moving train.

1. See this case, reported on p. 348, *ante*.

2. For report of this case see p. 354, *ante*.

though not a conductor, attempts to board a car on a train moving at a rate of from 12 to 15 miles an hour and is injured in the attempt, the railroad company will be held liable for damages.

McCobb Superior Court. The facts appear in the opinion. J. WINN, PHILLIPS & SESSIONS, for plaintiffs in error. KSON & KING, J. H. LUMPKIN, G. F. GOBER, for defendant in error.

Wells, J.—Plaintiff in the original action was a minor, residing in Atlanta, who went with two young friends to spend a day in Marietta and return on an evening train. While at supper at the house of a relative he heard the whistle blow, and starting in alarm, valise and umbrella in hand, went hurriedly down a street leading to the railway track, it being the shortest route to the depot. As he reached the track, he saw the train on which he intended to return moving on almost in front of him. His evidence was that he was "dazed" at the sight, and stopped for the moment on the roadside, but just then a person in the uniform of the railroad company, and who he thought was the conductor, but who was a brakeman, standing on the platform of a car, beckoned to him to come on. He did so, and the brakeman took his valise and tried to assist him to get on the car, but failing in this, called Wilson to catch the next railing. Wilson tried to do so, but was too late, and he tried to catch the railing of the rear platform of the same car, but as the train was moving at the rate of about fifteen miles an hour, he failed in this attempt, and his hand striking a brake-bar, he was thrown on his back, with one foot caught under the wheel and crushed so that it had to be amputated that night. In his evidence he states that he would have attempted to get on but for the invitation of the brakeman.

Wilson was at the time fifteen years old. The jury found for plaintiff \$4,500 damages. Plaintiff in error assigns the case here, assigning no error in the charge of the court, but claiming that the verdict was against law and the facts; and the only question is, was there evidence sufficient to sustain their finding. The verdict of the jury seems to have been based upon section 3034 of the Code, as they diminished the damages considerably below the amount in evidence, and they were equally held both parties at fault. The law as to diligence and negligence was correctly given in charge, and the question was

one exclusively for the jury. They had the right to weigh the facts, to consider the youth of the injured party, the circumstances surrounding him and urging his return to his train, that train with his young companions, the short time allowed for decision and action, and the invitation, given probably out of kindness, but a great mistake in judgment, by an employee of the road, dressed in its uniform, and who, though humble in position, was in this action the representative of the company, one for whose action it is responsible; and we see no reason to overrule the conclusion at which the jury unanimously arrived upon a matter strictly within their province. Let the judgment be affirmed.

Judgment affirmed.

INJURED WHILE ALIGHTING FROM TRAIN—AND LIABILITY OF CARRIER—EVIDENCE.—In an action to recover damages for injuries sustained by a person in the act of alighting from a train, alleged to have been caused by the negligent act of the railroad company in giving the train a sudden jerking while passengers were alighting, it appeared that the injury occurred on the line of a railroad other than that of the company against whom the action was brought. The court discussed the several assignments of error at some length. The points of argument of the court, with the points discussed, are sufficiently set forth in the summarized report of the majority of the court, as follows:

1. That the fact of the lease may be proved without producing the lease writing. Nothing in the writing can possibly prevent the liability of the actual carrier, holding itself out to the public as such, if it be proved that it was the actual carrier. As between itself and the lessor, it might regulate the payment of damages. As respects the public, it cannot. So if the lease showed that the lessor had to pay all the damages, it could not alter the responsibility of the actual carrier. Moreover, the pleading of the plaintiff admitted the lease, as I remember the record, not before me now.

2. The court committed no error in this charge, that the responsibility of the carrier extended until the passenger was at the end of the track, her ticket called for, landed safely on the ground. The court did not charge or intimate that the conductor's duty was to help the plaintiff woman off the cars; but as the contention of the defendant in error was that she was hurt by a sudden jerk of the train while she was getting off, herself the charge was exactly right. It would be strange law if the carrier should be bound until the train reached the depot, and then, when the passengers were getting off, the engineer should

to make sudden jerks and kill and hurt the passengers *ad libitum*. It would do the passenger little good to carry him safely to the station, but, the moment he got there, to jerk the cars about so that he would not land in safety. The liability of the carrier begins when the train starts and ends only when the passenger lands safely. If the train stops long enough for him to get off, and keeps still, then the company's servants have done all they could, and the fault is the passenger's; but if, by sudden jerks, while he is getting off, injure him, he having not time to get off safely—reasonable time, then the servants of the company have not exercised all reasonable and ordinary care due to everybody, but certainly not that extraordinary care and diligence due to a passenger. There was no error, we think, in qualifying the request as the judge put it to the effect that the servants or agents of the company must not be held liable, though the conductor be not bound to help women off the cars; the error obviously having reference to the jerks of the engineer.

Nor was there error in not granting the new trial on the newly discovered evidence. This ground is not a favorite with the courts. It is not a ground for a new trial, or impeaching, or both, here; and the counter affidavits were sufficient for the court below for the exercise of his discretion. The majority of the court think this ground does not authorize a new trial, over the objection of the presiding judge.

This court has ruled too often that conflict of evidence is for the jury, and when that tribunal settles it and the presiding judge approves the verdict, this court does not interfere, to repeat that stereotyped adjunction again.

It is for these reasons that the majority of the court decline in the case of this woman, though a colored woman, to interfere with the verdict of the jury and the judgment of the court below.—*Supreme Court, Georgia, February Term, 1885. CENTRAL RAILROAD v. WHITEHEAD*, 74 Ga. 441.

THE CITY AND SUBURBAN RAILWAY v. FINDLEY.

Supreme Court, Georgia, March, 1886.

[Reported in 76 Ga. 311.]

RAILROAD COMPANY LIABLE FOR INJURIES TO PASSENGER ALIGHTING FROM STREET CAR.—Where it appears that after several other passengers alighted from a street car that had no conductor, the plaintiff attempted to get off, and as he had one foot on the ground and the other on the step of the car, the car started and he was thrown to the ground and injured, the railroad company is liable.

WHEN PASSENGER IS INJURED, PRESUMPTION IS A
CARRIER.—Extraordinary diligence is required of the carrier
towards passengers, and when one is hurt by reason of its carriage, the presumption
is always against the carrier.

FROM the City Court of Savannah.

In addition to the facts contained in the opinion is the following
testimony: Plaintiff testified that, at the point of his destination,
a bell was rung by some other passenger and the car stopped; several
passengers got off, the plaintiff being about the last; he then
placed one foot on the ground, the other being on the step of the car;
the car started and threw him to the ground, breaking his hip and
the thigh and permanently injuring him; that the car had no
conductor, and that the injury occurred about eight o'clock in the
evening. "As I stepped in this position, I had hold of the railing,
intending to step straight off and put my left foot on the
ground at a place where there was a little rising of ground, not
level with the step. As I stepped off, I either let go the railing
or turned the wrong way. If I had known the car was going to
start, I might have saved myself falling."

The jury found for the plaintiff \$1,500. Defendant moved for
a new trial on the following grounds:

- 1, 3. Because the verdict is contrary to law and evidence.
4. Because defendant has discovered evidence since the trial,
the case not known to its officers or attorneys before the trial,
for want of due diligence. (The evidence was contained in an
affidavit of Benjamin S. Heape, attached to the motion for a new
trial, to the effect that plaintiff had stated, previously to the
opening of the suit, that the injury of which he complained was
caused by a fall from a horse.)

5. Because the verdict is excessive.

6. Because the court erred in charging the jury as follows:
"His (plaintiff's) theory of his case, that which he endeavored to
establish before you, is that, on the fourth of December (Tuesday),
1883, between 7 and 8 o'clock, somewhere between 7 and 8
o'clock in the afternoon, on the corner of the junction of Anderson
and Broughton Streets, he entered the street car, run by the
Atlantic and Suburban Railway Company, on the line of Anderson
Streets; that the car was of that class of cars which are
called non-conductors, having a driver, who was in general

car, to collect fare, and a box into which fares were to be placed; that is, the fares were to be placed in the box; that he was to see the exhibition, which was located on south side of Main Street, and that there were a number of other passengers in the car, and that when the car reached the place in the city where the exhibition was, it stopped and the passengers disembarked; that he was the last, or about the last, to dismount, and when he started out of the car, the car being stationary; that he stepped out with the left foot, on the left side of the car, stepping in the way the car was heading, and as he placed the left foot on the ground, and before he could move the right foot from the car, the car started forward, and in so doing, threw him to the ground, dislocating and breaking his hip and causing him injury, for which, he alleges, it is impossible for him to recover, and one who has done him very grievous injury. That is his theory of the case; whether he sustained it by fact or evidence or not is for the jury to say."

Because the court charged the jury as follows: "The defendant company answers and says: 'You have been injured, as it is alleged; we don't deny that, but we do deny that you have been injured by our fault. You are yourself to blame for the way in which you have been injured, because we have a car of a good and safe style of car, one that is habitually used and is as safe as any other car of its class. The car was in good order, and had a driver to get you to get off. The conductor examined and saw every one get off the car, yourself included, and then he started forward; and when you fell at that time and place, it was your own fault and not the conductor's.' That is the theory of the defendant; or else: if you had not gotten entirely off the car, you got off the car after the car started, and getting off the car while it was in motion was careless on your part, and in that way you were responsible; or if it had not been done in that way, there is no way in which it could be avoided, because, except by some accident, it is impossible to have a car fall; the said company was in the exercise of all ordinary care and prudence in the protection of its passengers and in the management of its road.' Now then, whether that is true or not is a question for you to determine from the evidence. That is the statement of the two sides of the case."

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8. Because the court charged as follows: "All actions sort necessarily imply fault somewhere."

9. Because the court charged as follows: "You are to award what you would consider damages that would compensate him. Not vindictive or punitive damages; nothing to punish the company, or be a warning to them, but such damages as will, in your opinion, compensate him for the expense and suffering he has gone through, physical and mental, for his present condition, for his decreased capacity to earn a living. In other words, such damages as, in your opinion, will compensate him for the injury received."

10. Because the court charged as follows: "If there was no negligence, you are to use that ordinary care and diligence, and the defendant is not guilty of any negligence in this matter, then you would award no damages."

11. Because the court charged as follows: "The law does not permit any man to estimate the damages, the power of estimation is exclusively for the jury, who must estimate damages at so much as they think proper."

Motion overruled, and defendant excepted.

LESTER & RAVENEL, for plaintiff in error cited: Code, §§ 2066, 2067; 3248; 40 Ga. 291; 71 Id. 644; 60 Ga. 185; 64 Id. 57.

J. R. SAUSSY, for defendant, cited: Code, §§ 2066, 2067; 61 Ga. 215; 55 Id. 126; 62 Id. 566; 73 Id. 513; 100 Id. 210; 51 Am. R. 239; 54 Ga. 180; 70 Id. 119, 722, 723; 169; 56 Id. 84, 363, 401, 545; 68 Id. 612; 69 Id. 608; 329, 608; 60 Id. 210.

Jackson, Ch. J.—Findley sued the City and Suburban Railway Company for injuries occasioned by the negligence of its servants in running the car, he being a passenger thereon. The jury gave him a verdict for \$1,500, and on a motion for a new trial being denied, the Railway Company assigns error on several grounds taken in its motion.

1. The first, second and third grounds proceed upon the assumption that the verdict is contrary to the evidence and to the law.

On a very careful reading of all the evidence in the case, it is very clear that the verdict is supported overwhelmingly by the evidence, if, indeed, it be not demanded by it. The plaintiff swears positively to the manner in which he was hurt, that he stepped off the car, with one foot on the ground and the

steps of the car, the driver drove off, which gave him a jerk, threw him on the ground and dislocated his hip, broke his leg there—to use his own language. The man who helped him living or doing business near by, heard his exclamation, “I am hurt,” and went to his help and took him into his shop. He landed where he was hurt, right where he landed from the car, but did not see how it was done. The fact that he was laid up many months in the hospital, suffered much, is permanently disabled, incapacitated for his calling and business, is overwhelmingly proved.

The only evidence to the contrary that he was hurt by the negligence of the driver, is that of the driver, and it is very unsatisfactory. He knew nothing at all about the disaster. His habit, he says, was to stop till all got off, and on this occasion, that night, he did so; he adds, after stating that he knew nothing about the hurt of a passenger right at the car, though a witness in his shop or store heard his exclamation of distress. *Central v. Sanders*, 73 Ga. 513.

When it is considered that extraordinary diligence is that required of the carrier of passengers, as well on a street car as on regular cars propelled by steam from city to city; that when one is hurt by reason of its carriage, the presumption is always against the carrier; and that the only evidence of having used ordinary care in landing his passenger is from the driver whose business it was, there being no conductor, to see his passenger safely landed before he started, after stopping to let the passenger land, who testifies that he did not know of the hurt of the passenger at all, though the evidence is certain that he was hurt, but that his habit was to stop till all got off, and that he did so that night. How can it be said that the verdict is not supported by evidence enough for it to rest upon? Doubtless the driver may have thought he saw all off, but he did not leave his post a moment; he evidently looked back in the rear and saw nobody there, and thinking that all were landed, he led the horse, and the man was crippled.

This is the truth, and it reconciles all the evidence. When the driver looked back the plaintiff was on the step with one foot, and on the ground with the other, and the driver did not see him, and he did not know, even, that he fell there and was hurt there. Is

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this extraordinary diligence? Was not the driver slightly negligent? It seems so to us, as it seemed, from the charge, the presiding judge, we gather, to him, to be much more than neglect, to wit, the higher degree of ordinary negligence. Code, §§ 2061, 2062.

That a carrier is bound to extraordinary diligence in respect to passengers, and that slight neglect only fixes responsibility on them, see Code, § 2067; and that this rule applies to street-carriers, see *Holly v. Atlanta Street R.R.*, 61 Ga. 211.

Therefore, this verdict is supported by the evidence sustained by the law.

2. The deposition on which the company relies as new evidence as the basis for a new trial is overwhelmingly disproved by many counter affidavits, and, besides, goes to the impeachment of the plaintiff as a witness. Possibly the deposition might not be sufficient to destroy its force, as it is the statement of the party that the affiant narrates, but the fact that it is disproved by facts beyond doubt, sworn to by many affiants, does annul its force. *Wallace v. State*, 70 Ga. 722.

3. The presiding judge has the right to state to the jury the several contentions of the parties. Indeed, it is his duty to do so. The only restriction upon it is that he state them fairly and without bias. He may sum up the evidence, being careful to give no expression or intimation of an opinion of its truth, with the better to state those contentions practically so as to be comprehended by the jury. These issues seem to us to have been fairly put to the jury, considered as a whole. They embrace long sentences and long paragraphs, some of which might, perhaps, be criticized if segregated, but in case any portion were assumed to be erroneous, the rule is that such error should be specified, and not done here. Therefore, the first and second grounds of the amended motion were properly overruled, and cannot work a new trial here.

4. Error is assigned upon this charge: "All actions of negligence necessarily imply fault somewhere." Taking this extract from the charge by itself, and it might be objectionable as excluding the idea of a mere accident. If there were any testimony that it was a mere accident it would be. But, in connection with the rest of the charge, it does no harm. The judge was upon rebuttal

ligence. The paragraph above that excepted to is, after stating what would rebut this presumption, "the presumption of negligence will be rebutted." Then follows: "All actions of this sort imply negligence somewhere." If the railway company is without fault, then the railway company cannot be held responsible. If the railway company is at fault, if it did not exercise all reasonable and ordinary care and diligence, then the railway company should be made to pay damages, unless you should find that the plaintiff, by the use of ordinary and reasonable care and diligence on his part, could have avoided the accident." So that the mind of the judge was on the presumption of fault in the company by the statute in all these cases—actions of this sort, and how that presumption could be rebutted by showing fault in the plaintiff. Somewhere it must be; for the law puts it, fixes it, on the company, until it shows no fault in itself or fault in the plaintiff.

5. The fourth, fifth, sixth and seventh grounds all relate to the charge on damages. It is to the effect that they should not be punitive or vindictive, nothing to punish or warn the company, but such damages as the jury believe would compensate the plaintiff for the expense and suffering, physical and mental, for his present condition and decreased capacity to earn a living; that they should pay him such as they believe would compensate him, of course, for what is said above; and that the law permits nobody else to measure damages but themselves; and that if by reason of the negligence of the company in this matter plaintiff was hurt such damages should be given. We see nothing to hurt the company in the charge to this effect. In connection with all the charge, and read in the light of the rest of it, it is good law and certainly not hurtful to the company. The charge is favorable to it all the way through, and erroneous as against the plaintiff on the question of diligence towards a passenger. The damages are reasonable and the result proper and legal.

Judgment affirmed.

BLITCH v. THE CENTRAL RAILROAD

Supreme Court, Georgia, March, 1886.

[Reported in 76 Ga. 333.]

FALLING FROM PLATFORM OF CAR OF SWIFTLY MOVING TRAIN—NEGLIGENCE NOT IMPUTABLE TO RAILROAD COMPANY.—In an action against a railroad company, when it is shown by the plaintiff's own testimony that when the train was within four hundred yards of his station, the conductor passed through the car and announced it and said to plaintiff, "I wish I was as near home as you are," and passed on to the platform of the next car, leaving open the door of the car in which plaintiff was; that the train was running rapidly, and that the plaintiff followed the conductor, and when he reached the platform of the car he was riding in he attempted to catch the railing, and was precipitated from the car by its rolling, and was injured, a suit was properly granted, and the mere announcement of the conductor that the train was approaching was not negligence.

FROM Effingham Superior Court. The facts appear in the following opinion.

J. G. & D. H. CLARK, for plaintiff in error.

LAWTON & CUNNINGHAM, for defendant.

Blandford, J.—Blitch brought his action to recover damages from the defendant. He was sworn, and testified that he was a passenger on the cars of defendant from Savannah to Numberville, on the Central Railroad; that when within three or four hundred yards of the station he was bound to, the conductor passed through the car and announced Number 3 ½, and said to Blitch, "I wish I was as near home as you are," and passed on to the platform of the next car, leaving open the door of the car in which plaintiff was. The train was in motion, running rapidly. Blitch followed the conductor, and when he reached the platform of the car he was riding in, he attempted to catch the railing; he was precipitated from the car by its rolling, and was badly injured. On this testimony, the court granted a nonsuit, and plaintiff excepted, and this is here complained of.

The defendant could well have defended itself by showing one of three things: 1. That the defendant had used all ordinary and reasonable care and diligence to prevent the injury. 2. That the plaintiff himself could have avoided the consequences.

defendant's negligence by the use of ordinary care and diligence on his part. 3. That the injury resulted from the negligence and of plaintiff himself.

We think it quite clear from the plaintiff's own testimony that the railroad company was not at fault or in anywise negligent. The mere announcement by the conductor of the station that a train was approaching cannot be construed into an act of negligence on the part of the company; it was but the customary warning to passengers to get ready for their departure by picking up their luggage and such parcels as they carry with them. It is also manifest that the injury was caused by the negligence of the plaintiff, in going upon the platform of a car moving rapidly in the dark, of his own motion, whereby he was thrown down and seriously injured; and lastly, it is shown by plaintiff's testimony that if there was negligence on the part of the company's agent, the same could have been avoided by his having exercised ordinary care and diligence on his part. All he had to do was to have remained in the car where he was until its arrival at the station and until it stopped, which it seems common prudence would have dictated to him. It appears that the plaintiff, in trying to make out his case, has put out a full and perfect defense for the defendant, rebutting the presumption of negligence against it.

One more error is assigned, that the court refused to allow the plaintiff to prove by one Snellgrove that the defendant's master of the car had agreed to pay all expenses incurred by plaintiff on account of his injury and illness.

The court did right to refuse this evidence. This agent of the company had no power to bind the company by such promise, and it is an admission by an agent made *dum fervet opus*.

The ruling of the court is approved, and his judgment affirmed.

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THE AUGUSTA AND SUMMERVILLE RAILROAD COMPANY v. RANDALL, ET UX. (1)

Supreme Court, Georgia, November, 1887.

[Reported in 79 Ga. 304.]

RAILROAD COMPANY LIABLE FOR INJURIES TO PASSENGER ALIGHTING FROM STREET CAR.—If a passenger on a street car, after signaling the driver to stop the car, and he does so, alights from the rear platform to alight, and while in the act the car is jerked forward, throwing the passenger to the ground and injuring her, the railroad company is liable.

STATEMENTS WHEN NOT *RES GESTÆ*.—Statements made by a passenger after falling from a street car, after she had gotten up her bundles and brushed herself, secured the name of the street, walked to her house, which she entered, deposited her bundles, and then walked across the street to a friend's house, are not admissible as the *res gesta*. (2)

PUNITIVE DAMAGES.—In an action against a street railway company for injuries, it is not error to refuse to charge that "the facts do not authorize punitive damages must be such as would subject the company to liability to conviction for criminal negligence if prosecuted therefor." (3)

FROM Richmond Superior Court.

The evidence for plaintiff tended to show that she was a passenger on a car of the defendant going to her home. On reaching a turntable on the track she rang the bell, and shortly afterwards the car stopped. She went to the rear platform to alight, but before she was able to do so the car was jerked forward, throwing her to the ground and injuring her seriously. Her arms were full of bundles, so that she failed to catch hold of anything to steady herself.

The driver of the car testified that he knew nothing of the injury, except that, after Mrs. Randall fell, he saw her get up.

1. Cited in Savannah, F. & W. R'y Co. v. Holland, 82 Ga. 257, 2 Am. Neg. Cas. 415. For report of the second appeal in this case see p. 435, *post*.

2. As to admissibility of statements, see note to this case & Eng. R.R. Cas. 446.

3. As to when punitive damages may be given, see note to 4 Southeast. Rep. 674.

He heard no bell ring before she left the car. Much other evidence was introduced by the defendant to show that the bell was not rung before Mrs. Randall attempted to alight, and that her injuries were not so severe as she testified. The car was crowded, and was moving slowly when she stepped off.

The material facts appear in the opinion.

F. H. MILLER, J. S. W. & T. DAVIDSON, for plaintiff in error.

TWIGGS & VERDERY, for defendants in error.

Blandford, J.—This was an action brought by Hattie A. Randall and her husband, to recover damages, against the Augusta and Summerville Railroad Company, for injuries which she alleged she had sustained by reason of the negligence of the servants of the company in throwing her from one of its cars, thereby injuring, wounding and bruising her, and causing her great pain and suffering. A verdict was had for the plaintiffs in that action, in which the jury assessed her damages at \$1,000. A motion for a new trial was made by the street railroad company on various grounds.

1. The first ground of error is, that "the verdict is contrary to the evidence, and the principles of justice and equity." We think there is nothing in this ground. There was enough evidence, if the jury believed the testimony of the plaintiff, to have authorized this verdict; and we do not see where the principles of justice and equity have been violated in the finding of the jury.

The second ground relates to practice and is omitted.]

2. The 4th ground is of a more serious character. It is as follows: "Because the court admitted in evidence, over the objection of defendant's attorneys, on direct examination, and after Mrs. Randall had testified, as a part of the *res gestæ*, the statement made by Mrs. Hattie A. Randall to her friend and relative, Mr. Shellman, who resided at a distance of a block and a half from the place of accident, and opposite her own residence, and whose house Mrs. Randall went after first going to her own home. The whole of this testimony appears in the brief of testimony, but the particular objectionable portion is the statement that she rang the bell and the car stopped before she attempted to get off, and then started and threw her from the platform; defendant's attorneys insisting that this was hearsay testimony inadmissible as a part of the *res gestæ*."

It appears in this case that, after Mrs. Randall was precipitated from this car upon the ground, and immediately after she had gotten up, picked up her bundles and brushed herself, the first thing she did was to secure the name of the driver of the car. According to her testimony, she knew him very well by having ridden in the same car with him often before; but at this occurrence the first thing she did was to inquire his name. She then went to her house, which was a block and a half or 150 or 200 yards; entered her house and deposited her bundles. She then left and went across the street to where Mrs. Shellman, her sister-in-law, lived, and while there made a statement to Mrs. Shellman as to how she was hurt. When Mrs. Shellman was produced to prove what Mrs. Randall said to her, objection was made to her testifying on that subject. She testified in this way (Mrs. Randall having testified first): that when Mrs. Randall came to her house, she was greatly excited, and in reply to Mrs. Shellman's inquiry as to what was the matter, she told her she had been thrown off the car and was hurt, and how she came to be hurt. Thereupon Mrs. Shellman got her a glass of brandy, made her some tea and gave it to her and put her to bed. It does not appear at what particular time she made this statement to Mrs. Shellman. Mrs. Shellman went on to testify that what Mrs. Randall stated to her at her house on that occasion was what she (Mrs. Randall) had sworn to on the trial of this case; but how long after the occurrence she made this statement to Mrs. Shellman does not appear in the record. Mrs. Shellman merely testified that what Mrs. Randall had stated in her testimony was the same thing she told her; but did not state what Mrs. Randall did tell her. The court, under these circumstances, admitted this testimony of Mrs. Shellman as part of the *res gestæ*.

As we understand it, *res gestæ* are things connected with the transaction, taking place and stated at the time of the transaction. But that doctrine has been somewhat extended by our courts. Our Code declares (§ 3773) that "declarations accompanying the act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of *res gestæ*." Declarations not connected with the transaction, nor bearing upon it, or serving to illustrate it, although made at the very time the act was committed, are not admissible.

vidence; they must be connected with the main act. And it is the duty of the court, when testimony of this sort is offered, to determine, before it goes to the jury, whether the declarations are connected with the main act, or so nearly connected in point of time as to be free from all suspicion of device or afterthought. The court must determine this before admitting the testimony to the jury; and after it goes to the jury, they may also consider it, and determine what it is worth, under a proper charge from the court. Under the facts as they appear in this record, were these declarations connected with the transaction? They were not made at the time of the act complained of. But were they so nearly connected with this main fact in point of time as to be free from all suspicion of device or afterthought? Upon recovering herself, after this occurrence, the first thing she did was to inquire the driver's name. What for? What was her object? What was her purpose in inquiring the name of this driver, whom she knew well by sight and with whom she was personally acquainted, having ridden with him frequently on the car? Is she free from all suspicion that she had an ulterior purpose or design in making this inquiry? Does it not give rise to the suspicion that she was fixing for a case against this street railroad company? Does it not have that appearance? This was done after the act was over. She then went to her own house, 150 or 200 yards off, and put away her bundles; then crossed the street and went to her sister-in-law's house, and while there entered into the details of how this thing occurred. We are of opinion that the court did wrong to admit this as a part of the *res gestæ*. It is not free from all suspicion; it is not connected with the transaction so closely in point of time as to be free from all suspicion of device or afterthought. The suspicion might arise in the mind of any man, that here was device or afterthought. She inquired the driver's name for some purpose. She had had time to look over the field; she seemed to have known her rights and was preparing for them. Having done this, she went and made a relation to her sister-in-law, stated in her testimony, about having rung the bell and the car having stopped, her attempt to get apart from the car, and the starting of the car without affording her a reasonable opportunity to get off—the vital facts upon which the whole case turns. These declarations were not exclam-

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atory on her part, upon receiving this injury. And we help coming to the conclusion in our own minds that he artifice or afterthought, or at least that it is not free from suspicion. The court erred in not rejecting it.

We are aware that what has been said may appear to be in conflict with some of the former decisions of this court; but a examination of these declarations will show that they differ from the present case in their facts. The case of the August 1890 *tory v. Barnes*, 72 Ga. 217, was much relied on by counsel for the defendants in error in this case. That case must rest upon its own peculiar facts, and will not be extended to this case; but it differs widely from this case in all respects, in point of time in which the declarations were made, in the proximity of time in which declarations are made to the transaction is not the only test of their admissibility in evidence, but they must be also free from all suspicion of device or artifice or thought. The testimony admitted as *res gestæ* in this case is very material. Mrs. Randall is but feebly sustained in her testimony that she rang the bell and that the car stopped. The testimony is very strong and weighty that no bell was rung, that the car was not stopped, that she attempted to get off the car about the place she had often before gotten on and off, without its being stopped, and that it was not a usual place for the car to stop. But if she rang the bell, and if the driver recognized the signal, whether it was at the usual place for stopping the street car or not, then he ought to have given her a reasonable opportunity to get off and not jeopardized her person in this way.

4. The main question in this case is, was this company negligent of negligence? and there is nothing else in it, leaving out the testimony of Mrs. Shellman, which we do not think ought to have been admitted. If Mrs. Randall made that signal by the ringing of the bell, or gave any other signal which the driver recognized, and if he stopped his car for her to get off, and did not stop long enough to give her a reasonable opportunity to depart from the car, then the company was negligent, in our opinion. This is the fact for the jury, and they had a right to believe Mrs. Randall's preference to all the other witnesses who testified against her testimony resolves itself into that, and that alone, and that is all there is in this case, when you sweep out her being bolstered up by

in-law, Mrs. Shellman. It would be hardly necessary, if the did not go back, for us to notice another ground of exception under our view of it. . . .

The next ground is, "because the court refused to charge, as requested in writing by the defendant's attorneys, as follows: 'The damages are only the imaginary result of the tortious act, and under the remote and continuous circumstances preponderate largely in favor of the injurious effect, such damages are too remote to be a basis of recovery against the wrongdoer, and damages are not due to the act, but not its legal or material consequences, but to the remote and contingent.'" Code, §§ 3072, 3073.

We think the court did right to refuse that charge. We do not think where any remote damages are claimed in this case. If a person is injured by the negligence of a railroad company, the question of the injury is a proper subject-matter of inquiry. How much hurt, did she have a miscarriage or abortion in consequence of the injury, did she suffer great pain in consequence of the injury?—all these are legitimate matters of inquiry, and are consequences too remote. And the testimony afforded in this case did not authorize the court to charge these two sections of the Code.

Another ground of exception is, that "the court refused to charge, as requested in writing by the defendant's attorneys, as follows: 'And should it appear that the negligence of the railroad would not have damaged the party complaining, but by the interposition of an agency over which the railroad neither had exercised control, she was damaged, then the party complaining cannot recover.'" We think the court did right to refuse that charge, for the reason that it was not applicable to the facts of this case.

The next ground is, that "the court refused to charge as requested in writing by the defendant's attorneys, that the facts of the case, to authorize punitive damages, must be such as would render the driver liable to conviction for criminal negligence and executed therefor." We think the court did right to refuse that charge. Punitive damages are given as a compensation for the manner in which the thing is done; and the injury to the feelings of the party is taken into consideration; but there is nothing of that sort in this case, according to the evidence

in the record, and nothing in the pleadings to make such as that.

9. The next ground of exception is, "because the court to charge, as requested in writing by defendant's attorney act of 1855 (p. 155), now section 3033 of the Code of Georgia particularly in the enactment that 'the presumption in all cases against the company,' is unconstitutional, and in violation of article fourteen of the constitution of the United States in that it is the enforcement of a law which abridges the privileges and immunities of the defendant, in that it puts upon it a burden of proof which is not enforced against private citizens."

This presumption that, where the plaintiff has shown that he was a passenger, and was hurt or damaged by the running of a railroad company's trains or machinery, the company was negligent, is a common law presumption. It is no new thing that it was not enacted in this State until the act of 1855. It obtained at common law, and had been the law of England and of this country all the time. It puts no greater hardship upon this company than upon anybody else engaged in the same or other business.

If this clause of the constitution were to be interpreted as insisted upon by counsel for the plaintiff in error, it would require the requirement that a man should obtain license in order to sell spirituous liquors; for why should he be required to obtain a license any more than the merchant who sells dry goods, etc., and who is not required to have one?

Such a construction is clearly not contemplated by the fourteenth amendment. It refers to classes, and means that it shall not impose a different rule upon a man whose color is black than that imposed upon one whose color is white. That was the purpose of the amendment; that is why it was put there; and it was not intended to mean anything else. The court did right in refusing the charge requested, and if he had given it, would have committed manifest error.

10. There are several other grounds of exception, all of which have the effect that the verdict was contrary to the charge of the court. That simply means that the verdict of the jury is contrary to the law, and we do not think it is. This disposes of all these exceptions.

The case is reversed, therefore, on the assignment of error.

th ground of the motion for new trial, viz.: the admitting in
ence of the statements of Mrs. Randall to Mrs. Shellman as a
of the *res gestæ*.
udgment reversed.

THE WEST END & ATLANTA RAILWAY CO. v. MOZELY. (1)

Supreme Court, Georgia, October Term, 1887.

[Reported in 79 Ga. 463.]

IGHTING FROM CAR—CHARGE AS TO DEFENDANT'S
NEGLIGENCE.—Where, in an action for damages for injuries sustained
while alighting from a car, a charge to the jury assumed the negligence
of defendant upon the facts submitted, it was held error, as it took
from the jury their right to consider the facts and to decide as to which
of the parties was guilty of negligence.

FROM the City Court of Atlanta. The facts are stated in the
inion.

BROYLES & JOHNSTON, for plaintiff in error.

WIMBISH & WALKER; J. H. LUMPKIN, for defendant.

Blandford, J.—Mozely brought an action against this com-
ny, claiming damages for injuries which he alleged he sustained
getting off the cars of the defendant. There was a great deal
evidence introduced on both sides. The evidence was very
conflicting, and would authorize a verdict for either party in
the case; the jury could have found for one as well as for the
other. A motion for new trial was made on certain grounds by
the company, the verdict having gone against them. It is only
necessary to notice two of these grounds:

1. The court charged the jury: "If the plaintiff rang the bell
as a signal to the driver to stop, and the car stopped, and the
plaintiff, without fault on his part, was in the act of alighting,
and before he had completely left the car—as by having one foot
on the ground and one still on the step—the car suddenly
started forward at the will of the driver, and the plaintiff was, by

Cited in *Covington v. West. & Cent. R.R. v. Neighbors*, 83 Ga.
R.R. Co., 81 Ga. 273, 275, 2 Am. 444, 446.
Cas. 406; distinguished in

reason of the start or jerk, thrown to the ground and injured, the defendant would be liable." We think this charge was error. It took from the jury the consideration of the great fact in the case, whether the defendant was guilty of negligence in thus doing. It was for the jury to say whether these facts made the defendant negligent. They were the legal alchemists, as has been said by a distinguished member of this court, to determine what was negligence and what was not negligence. It was not for the court. This charge is equivalent to telling the jury that this thing took place and that the defendant was negligent. His saying the defendant would be liable is equivalent to saying the plaintiff could recover.

2. The next charge excepted to is the following: "If the plaintiff signaled the driver to stop, and the driver did not stop, and did not allow the plaintiff reasonable opportunity to alight with safety, and the driver only slackened his speed, and the plaintiff, to avoid being thrown beyond his destination, and availing himself of what opportunity was afforded him to alight, endeavored to get off the car while in motion, and was thrown by a sudden jerk of the car, the defendant would be liable, provided you believe from the evidence that the driver was negligent in not stopping the car altogether." We think also that this charge was error, because the court should have further qualified it by saying, if the jury further believed that the plaintiff used all reasonable and ordinary care and diligence to avoid the consequences of the defendant's negligence, and was thrown by himself. We think it was error to give the charge without qualification.

The judgment of the court below is reversed.

DIXON V. THE MOBILE & GIRARD RAILROAD COMPANY.

Supreme Court, Georgia, February, 1888.

[Reported in 80 Ga. 212.]

CHARGE OF COURT UNDER LAWS OF ALABAMA IN CASE OF GROSS NEGLIGENCE NOT GROUND FOR NEW TRIAL. A suit against an Alabama railroad company for injuries received by a passenger jumping from its train in that State, where the evidence showed gross negligence on his part, provided the jury believed he was prompted by the conductor to jump, and the whole case turned upon that question, and the jury found for the railroad company,

ground for a new trial that the court charged the jury that under the laws of Alabama, if he contributed to the injury, the plaintiff could not recover when the result would have been the same if the charge had been under the laws of Georgia.

FROM Muscogee Superior Court.

Plaintiff's declaration alleged, in substance, as follows: He got aboard defendant's regular passenger train at the town of Seale, Alabama, for transportation to Nuckol's Crossing, a station on its line, and paid his fare. The company's servants negligently failed to stop at said crossing so that he could safely alight, but passed through at too great a speed, so that plaintiff, without fault on his part, in attempting to get off, was violently dashed against the ground and injured. The defendant has an office in Muscogee County. By amendment, he alleged, that when the train reached the crossing, and while going at a fast rate of speed, the conductor ordered him to jump off, which he did, having no other way to get off, and thereby sustained the injury.

Defendant pleaded the general issue. Also that it was a foreign corporation of Alabama, with its track and roadbed in that State; that the injuries were received there, and not in Georgia; and that they would not have been received without fault and negligence of the plaintiff, which contributed directly to produce the injury.

The evidence for the plaintiff tended to support his allegations. He testified that the train did not stop at his destination, but went on at a rapid speed, and when about 250 yards beyond the stop-place, and while in rapid motion, the conductor caught him by the arm and said, "Now, jump; I am in a hurry," and that he obeyed and was hurt.

The only evidence for the defendant was that of the conductor, who testified as follows: Plaintiff informed him that he wished to get off at the crossing. The engine whistled, and the train was stopping; it passed the crossing about 100 yards. Plaintiff went upon the last step of the car; witness saw he was about to jump off, but was afraid to speak to him because he might not understand; was about a car-length from him when he jumped; did not touch him, nor tell him to jump or not to jump. The train was moving about four miles an hour; it came to a full stop one or two car-lengths. It stopped there only when there were

passengers to get on or off; that was not a regular station. The plaintiff's negligence pulled the bell-rope to stop the train.

The jury found for the defendant. The plaintiff moved for a new trial on the following grounds:

1-3. The verdict is contrary to law and evidence.

4. The court charged as follows: "But it is replied, on behalf of the defendant, the carrier, that he voluntarily got off the train while it was in motion. Well, gentlemen, look to the evidence and see whether he got off voluntarily—whether it was his own act; if it was his own act, although the conductor, the carrier, may have been in some fault in passing the station and in not stopping the train for him to get off, if he jumped off under circumstances that a prudent man who knows danger, a man of ordinary prudence, would not, why then the company would not be liable."

5. The court charged thus: "This transaction took place in Alabama; it was an Alabama railroad, and there is no such thing as approximate contributory negligence allowed in that State. It excuses parties for their own want of prudence, prudent conduct on such occasions as this. Was it in consequence of his voluntary act? If the conductor told him to get off, as I stated; if it was a command, and he got off in obedience to that, and was hurt, then the railroad is liable. If he got off without any command, without any suggestion from the conductor at all, and got off voluntarily, he jumped of his own accord, under circumstances that a prudent man would have seen more dangerous, if any, and that he would not to have jumped off, the railroad company would not be liable. Contributory negligence, gentlemen of the jury, is when the plaintiff contributes to the accident, to the injury that he himself receives. For instance, a passenger on board a train behaves imprudently, exposes himself voluntarily to danger, and it is of his own volition that he does it, and he is hurt in consequence of it. Now, under the laws of our State, the degree of contributory negligence that have been taken into question, and still the carrier has been held liable. But under the laws of Alabama, if he was hurt when the occurrence took place (and they were running under the laws of Alabama, and performing their duties as a railroad in the State of Alabama, and bound by those laws, and the liability accrued, if it accrued at all, gentlemen), if he voluntarily jumped from the train, without any suggestion, or intimation, or fault of the carrier,"

agents who had charge or authority in the premises, and was thereby, the carrier is not liable at all if the injury was in consequence of the jumping."

The court charged thus: "It is alleged that this boy was a youth and that he did not have discretion to know what his act ought to have been; that he didn't have judgment enough to conduct himself with that prudence that an older person would have done under the circumstances. Look to that, gentlemen of the jury, and ascertain whether he had discretion and judgment enough to know when he was exposing himself to danger. If he didn't, why that is the reason of the rule that the defendant has just stated. Look to all the facts and circumstances; look to the fact that the train passed beyond the station, and give it just such weight, gentlemen of the jury, as you think it is entitled to, if you think that was the cause of the damage to the plaintiff. He did not act voluntarily. If he acted voluntarily in jumping off the train, without any suggestion, or any intimation, from the defendant or its agents, why, gentlemen, take it into consideration and give it what weight you think it is due. But I repeat again, the plaintiff jumped voluntarily from that train when it was in motion, and that was an act of imprudence on his part and was the proximate cause of the injury that he suffered, and he so jumped without the direction of the defendant or its authorized agents, then he would be entitled to recover nothing under the facts of this case."

The motion overruled and plaintiff excepted.

F. POU, L. F. GARRARD and L. MCLESTER, for plaintiff.

LEABODY, BRANNON & BATTLE, for defendant.

Meekley, Ch. J.—The plaintiff, being a passenger upon the defendant's railway, was injured by leaping from the train. This took place in Alabama, and the defendant is an Alabama corporation. The court charged the jury that, according to the law of this State, if the plaintiff contributed to the injury he could not recover. The facts in evidence made a clear case, not only of contributory but of gross negligence, provided the jury believed that the conductor did not prompt the plaintiff to jump from the train; and that question was fairly submitted to the jury; under the charge of the court, the whole case was made to turn upon it. We think, under these circumstances, that the effect of contribu-

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& BATTLE

tory negligence, whether tested by the Alabama law or ours would not and ought not to change the result. The court is therefore, right in refusing to grant a new trial.

Judgment affirmed.

COVINGTON v. THE WESTERN & ATLANTIC RAILROAD CO.

Supreme Court, Georgia, March, 1888.

[Reported in 81 Ga. 273.]

WHETHER A TRAIN REMAINED AT STATION SUFFICIENT TIME FOR PASSENGER TO ALIGHT SHOULD BE LEFT TO THE JURY.—In an action for injuries received by a passenger in jumping from a train after it had started from a station, the court should leave to the jury the question whether the time the train remained at the station was sufficient for the passenger to alight or not. If the time was sufficient, he could not recover. If the time was not sufficient and if in attempting to alight he was not guilty of such negligence as would bar him from recovering, he would be entitled to damages.

QUESTION OF NEGLIGENCE IN JUMPING FROM MOVING TRAIN SHOULD BE LEFT TO THE JURY.—A charge which takes from the consideration of the jury the question whether the act of jumping from a moving train was negligent or not is erroneous.

FROM Gordon Superior Court. The facts are stated in the opinion.

T. C. MILNER and J. M. NEEL, for plaintiff.

MCCUTCHEN & SHUMATE, R. J. McCAMY and O. N. SAMPSON, for defendant.

Blandford, J.—The injury to the plaintiff is alleged to have resulted from the failure of the defendant to stop the train at the station a sufficient time to allow him to alight from it in safety.

1. The first ground of the amended motion for new trial is that the court refused to give the following charge as requested: "The law allows you to take account of the excitement which an act is done, even where the party is not menaced with bodily hurt, if the circumstances are such as naturally to produce excitement in a prudent person."

We cannot say that this is not good law in the abstract; but we do not think it is strictly applicable to the facts of this case. The plaintiff, who testified as a witness, did not testify as to any excitement.

that he was under at the time he jumped from the train; nor the declaration state anything in reference thereto. Hence, cannot say that the court committed such an error in refusing to give this charge as would warrant us in reversing the judgment of the court below.

The second ground is, that the court refused to charge: "That by defendant's negligence, plaintiff was placed in the midst of circumstances calculated to excite and throw a man of ordinary prudence off his guard, and there was a sudden necessity for him to decide, without time for reflection, then his failure to act with perfect calmness and self-possession might not render him culpably negligent or wanting in ordinary care, even though he acted more wisely than a man of ordinary prudence, perfectly cool and self-possessed, would have acted; that the law allows the jury to take account of the excitement under which an act is done, even where the party is not menaced with bodily hurt, if the circumstances are such as naturally to produce excitement in a prudent person." That we have said in reference to the preceding ground will apply to this ground of the motion. While in a proper case made out, it would be a proper charge for the jury, we do not think that the refusal of the court to give it in charge in this case is such as to demand a reversal.

The last ground of the motion is, that the court charged: "That defendant's agents were guilty of negligence in failing to stop the train a reasonably sufficient time to allow plaintiff to get off, and after the train was in motion at a speed which made it unsafe for plaintiff to jump off in the dark, and under the circumstances, if plaintiff of his own motion jumped off the train and was thus injured, then he could not recover."

We think this charge was error. It took from the consideration of the jury the question of whether the jumping from the train under such circumstances was an act of negligence or of ordinary care and diligence. That was a question for the jury, not for the court. See *West End and Atlanta Street R.R. v. Mozely*, decided at the last term of this court (79 Ga. 463), where a similar charge was held to be error. We have repeatedly decided that the question of what is or is not negligence, in cases of this sort, is exclusively for the jury. It is a mixed question of law and fact which the jury must settle for itself.

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3. If this case had been tried upon a right theory, I do not know that we would grant a new trial even upon this ground, under the facts of the case. But it appears to us that the case was not tried upon the true theory. The main question in this case is, whether the railroad company stopped its train a reasonably sufficient time to allow the plaintiff to depart from the train in safety. If it did, and he jumped off the train after it was again in motion, he cannot recover. If it did not stop a sufficient time, and if in attempting to get off he was guilty of no negligence, or not such negligence as to bar his right to recover, then he would be entitled to such damages as he may have sustained. That is the only question that need have been submitted to the jury by the court. As to the fact whether the train stopped a sufficient time, the witnesses for the plaintiff and defendant differed. The employees of the railroad testified that the train stopped several minutes, and that the time was sufficient; some of the passengers testified that it stopped about a minute. The court should have left to the jury for their determination the question of whether the time was sufficient or not. If the time was sufficient, he could not recover. If the time was not sufficient, and he attempted to alight after the train started, and was not guilty of such negligence in so doing as would bar his right to recover, he could recover. Or it may be that he contributed in some measure to the injury; and that it is a question for the jury. If there was contributory negligence on his part, the jury could set it off against the negligence of defendant, and award the damages accordingly.

While we do not feel inclined to reverse the judgment (for it appears to us that the verdict is sustained by the evidence), yet we feel constrained to do so under the facts of this case.

Judgment reversed.

WATSON v. THE GEORGIA PACIFIC RAILWAY COMPANY.*Supreme Court, Georgia, October, 1888.*

[Reported in 81 Ga. 476.]

NONSUIT PROPER WHEN PLAINTIFF'S EVIDENCE SHOWED NEGLIGENCE IN JUMPING FROM MOVING TRAIN.—Where it appeared from the plaintiff's evidence that after arriving at the station and about to get off the train, the conductor told her not to do so, as he had to back the train out and would stop it at a cross street nearer her destination, and, relying on the promise, she remained on the train and it was not stopped at the cross street, she jumped from the train while it was moving, and was injured, a nonsuit was properly granted.

FROM Fulton Superior Court.

Mrs. Lou Ella Watson, a married woman, living with her husband, brought action against the railway company for damages for a personal injury sustained by her while she, a passenger, was attempting to alight from defendant's cars. On the trial she proved that on the evening of July 7, 1886, she received a telegram at Salt Springs, summoning her to the bedside of her mother who, it informed her, was lying at the point of death. She boarded the train of defendant early the next morning, accompanied by two small children, and asked the conductor if he would stop at Simpson Street in Atlanta and put her off. He promised to do so, but the train did not stop at that street on reaching it, but moved on to the passenger depot. Her father jumped on the train at that street and accompanied her to the depot. On arriving there, she started to leave the train with her father and children, the other passengers having left the coach she was in; but the conductor, standing at the car steps, told her not to get off, as he had to back the train out, and would stop it for her at Simpson Street crossing. She asked him when he would go back, and he replied, immediately, and at once signaled the engineer to pull out. She and her father and children remained in the coach, and the train was pulled slowly out to Simpson Street crossing, but did not stop there; and finding that it did not, and being anxious to reach her mother, after the train had run some distance beyond Simpson Street, her father stepped out, taking one of the children with him and command-

ing the other to stand on the car step until he could take it off, put the first down and ran back and got the other safely off; and then the plaintiff undertook to step off, stepping from the car to the ground, in doing which she fell or was thrown, and was seriously injured. She did not see the conductor after she had the conversation with him at the depot.

At the conclusion of plaintiff's evidence, defendant moved for a nonsuit, which was granted, and plaintiff excepted.

GEORGE T. FRY, F. A. ARNOLD, JOHN G. COLDWELL and JOHN C. SMITH, for plaintiff, cited: 58 Ga. 461; 45 Ga. 288; 51 Ga. 489; 71 Ga. 714; 76 Ga. 780; Rorer Rail. 967; 9 Am. & Eng. R. Cas. 322, 412; 12 Id. 119; 6 Wait Act. & Def. 586.

JOHN L. HOPKINS & SONS, for defendant, cited: Hutch. Car. § 617; 2 Redf. Rail. 261; 50 Ga. 353; 76 Ga. 333, 508; 71 Ga. 415; 5 S. E. Rep. 496; 12 Am. & Eng. R. Cas. 115; 1 Id. 240; Rorer Rail. 1091; 1 Shear. & Redf. Neg. 167; Patterson R'y Ac. 21; 38 Ga. 437; 74 Ga. 611; 77 Ga. 789; 76 Ga. 333.

Blandford, J.—We think the court below was right in nonsuiting this case. If the railroad company was liable to the plaintiff for anything, it was liable to her for damages for the breach of promise to let her off at Simpson Street crossing. Whatever damages accrued to her by reason of the breach of that promise she might, perhaps, recover, but we do not decide whether she could or not. But she chose to bring her action for the injuries which she sustained; and we think her testimony clearly shows that she could have avoided the consequences to herself by the use of ordinary care. If she had just kept her seat in the car she would not have been hurt. According to her testimony, she took the risk of getting off, and we think, as she took the risk, she must take the consequences. Her departure from the train, under the circumstances, showed no want of diligence on the part of the railroad company.

Judgment affirmed.

THE ATLANTA & WEST POINT RAILROAD CO.
V. SMITH, ET UX.

Supreme Court, Georgia, October, 1888.

[Reported in 81 Ga. 620.]

INSUFFICIENT TIME TO ALIGHT FROM TRAIN.—When it is proved to the satisfaction of the jury that the plaintiff did not have sufficient time to alight, the train stopping only about half a minute, and the plaintiff was thrown down and injured by the train suddenly starting as she was alighting, a verdict for the plaintiff will not be disturbed.

FROM Campbell Superior Court. The facts appear in the opinion.

BIGBY & DORSEY and C. S. REID, for plaintiff in error.

THOS. W. LATHAM, for defendant in error.

Simmons, J.—John Smith for his wife, Jane Smith, and Jane Smith for herself, sued the railroad company for damages. The nature of the complaint will appear in the report of the testimony. The defendant pleaded the general issue.

On the trial, the plaintiffs showed as follows: Jane Smith was a passenger on defendant's train from Atlanta to Palmetto. As the train neared the station, the station signal was given, and as it approached still nearer the depot, the name of the station was called and the train slackened its speed, and Jane Smith and another passenger, and probably others, left the train; but it stopped for so short a time that a passenger who immediately preceded Jane Smith in leaving had to jump; and Jane Smith was thrown and sustained the injuries for which she sues. She was seated near the door of the car; was incumbered, according to her statement, with only a valise, and according to the statements of others, with some other small bundles; made arrangements to leave the train as it approached the station, and did expeditiously leave and attempt to alight with due care, but the train started with a sudden jerk and threw her to the ground. The fact that the train stopped for a length of time entirely insufficient to allow passengers to alight safely, was overwhelmingly established by the plaintiffs' testimony, if the jury were disposed to credit it. The length of time it stopped is variously estimated by these witnesses at from a second to about half a minute; and

the whole evidence for the plaintiffs, taken together, show that she rapidly left the train, undertook to alight and was thrown. She was hurt about the face, shoulders and rendered unconscious by the fall; was confined to the bed of her daughter for two weeks before she could go home, and two more weeks or longer there, after she was taken to the wagon. Her injuries were so painful that she could not get up. She suffered a great deal, and still suffers at the time of the trial. She had been a stout woman, able to do any sort of work except to plow, and had earned, when in service, as high as ten dollars per month, and was fifty-five years old at the time of the injury, since which she has not been able to work as she did before, though she can still do work about the house, such as cooking, etc. No man told her to jump off the train and she did not catch her. The plaintiffs introduced the Carlisle tables of

The testimony for the defendant conflicted directly with that of the plaintiffs as to the time the train stopped. It was testified that Jane Smith attempted to alight at the usual place for passengers to alight; but various persons, employees of the railroad and others, swore that the train stopped about the usual time, a minute or more, and passengers got on and off safely; that the baggage was attended to by the express messenger on the train, and others before it started; that one passenger got off, went a short distance away, left his baggage with a hotel porter and returned to the train again before it got under headway; that an express matter from the train and went a short distance away, started; and that another put butter on the train and had a conversation with the conductor before it started. The evidence for the plaintiffs tended to show that Jane Smith did not go directly and rapidly to the door of the train, but was seen standing in the door of the car talking to some person before it started; also, that the train did not move suddenly, but a jerk, but slowly and gradually; also that someone told Jane to jump, after the train started, and said he would catch her, and she did so jump and was hurt. The evidence for the defendant, taken together, tended to show that Jane Smith was thrown from the train because she lingered too long before alighting and did not take time to get off after it started.

The jury found for the plaintiffs \$500. The defendant appealed for a new trial on the grounds that the verdict was contrary to the evidence.

and evidence, and was excessive. The motion was overruled, and defendant excepted.

1. The evidence in this case was conflicting as to the length of time the train stopped at the station, the plaintiff's witnesses testifying that the time was not sufficient to enable the plaintiff, who was an old woman with satchels and bundles in her hand, to safely alight from the train, and the defendant's witnesses testifying that the time was ample, if she had used proper diligence. The jury believed the plaintiff's witnesses; the court below was satisfied with the finding of the jury, and we cannot say that the court erred in refusing to grant a new trial on the ground that the verdict was contrary to the evidence.

2. Nor do we think that the verdict is excessive, or so excessive as to show bias or prejudice in the minds of the jury. The plaintiff testified that she was confined to her bed and room for months, and suffered great pain, and still suffers pain from the injury she received by reason of the negligence of the defendant's servants. If her statement is true (and the jury believed it), we do not think \$500 damages are excessive.

Judgment affirmed.

THE SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY v. WATTS. (1)

Supreme Court, Georgia, March, 1889.

[Reported in 82 Ga. 229.]

PASSENGER JUMPING FROM MOVING TRAIN THAT AFTERWARDS BACKED TO STATION.—It being shown by the plaintiff's evidence that just before the train reached his station the conductor announced it and notified him that the train would stop there, but it went beyond the station, and after it had gone one hundred and sixty-five yards the plaintiff jumped off and was injured, and the train, after going fifty yards or so further, backed to the station, the court below should have granted a nonsuit.

FROM Thomas Superior Court. The facts appear in the opinion.
A. T. MACINTYRE, JR., and CHISHOLM & ERWIN, for plaintiff,
in error.

W. M. HAMMOND, for defendant, in error.

1. Cited in *Jarrett v. R.R. Co.*, 83 Ga. 347, 350.

Simmons, J.—Watts sued the railroad company for damages. On the trial he testified to the following state of facts: "On October 5th, 1884, I was a passenger from Thomasville to Cairo, and had paid for a ticket to Cairo. Was going there to go home; was going to my place of business. The train reached Cairo about 3 P. M. I was hurt in getting off the train at Cairo. A bone in my left leg, just above my ankle, was broken. The hurt happened by my jumping off. I made an effort to get off to get home. As we approached the station signal to stop was made with the bell. The conductor called out 'Cairo.' Didn't stop still. After I got off train had slacked, but got a little faster. It was going about three miles an hour when I got off. Thought I wouldn't hurt myself by jumping. I was compelled to get off for business. The train was going west, toward Chattahoochee. From the rate it was going at the time, and all the circumstances around me, I thought it prudent for me to get off when I did. I was careful in doing so, and would have done so safely, but I jumped on the slant of a little embankment about four feet high, and my leg was broken. When we neared Cairo the conductor called out 'Cairo.' The conductor notified me they were going to stop at Cairo. I got up and walked to the platform. After the train was 165 yards from the platform I jumped off on the embankment. After I jumped the train stopped and backed back on the side track. It went to the other end of the switch and backed back. If I had waited a minute or so I could have gotten off without injury. This was a fast mail train. The fast mail trains met there and passed. This train I jumped from only went fifty or one hundred yards, then backed on the side track, and in a minute or so the east-bound train passed on the main track. No one told me to jump. I did it of my own accord. I don't know how fast it runs—ain't got any judgment on that train; may go sixty miles an hour for all I know. Have traveled in trains often, but don't know how fast they go."

On this state of facts the defendant below moved a nonsuit, which was refused by the court. The case was submitted to the jury on this testimony, and the jury returned a verdict for the plaintiff. A motion for a new trial was made by the defendant, and was overruled. The defendant also excepted to the refusal to grant a nonsuit.

We think the court should have granted a nonsuit on the motion of the defendant; and, after the refusal to grant a nonsuit, should have granted a new trial. It is useless to argue the question. A mere statement of the evidence is sufficient, in our opinion, to show that the court erred in not granting the nonsuit, and in refusing the motion for a new trial.

Judgment reversed.

THE SAVANNAH, FLORIDA AND WESTERN RAILWAY COMPANY v. HOLLAND. (1)

Supreme Court, Georgia, March, 1889.

[Reported in 82 Ga. 257.]

DECLARATIONS OF PLAINTIFF MADE MORE THAN A HALF HOUR AFTER THE INJURY, NO PART OF THE *RES GESTÆ*.

—The plaintiff, a passenger upon a train, being carried past the station at which he wished to get off, requested the conductor to stop the train, and the evidence being conflicting as to whether he alighted safely and was injured by falling through a trestle on the way back to the station, or whether he fell through the trestle in alighting by reason of being pushed off by the conductor, testimony of a witness for the plaintiff of declarations made by the plaintiff to the witness, about half an hour after the witness first heard cries, of the manner of the plaintiff's leaving the train and receiving the injury, was no part of the *res gesta*, and a judgment entered on a verdict for the plaintiff was reversed.

FROM Mitchell Superior Court, November Term, 1887.

Thomas E. Holland sued the railway company for \$10,000 damages, alleging in brief that he was a passenger on its train, going from Valdosta to Camilla, at night; that its servants negligently failed to notify him of the arrival of the train at Camilla, and he was ignorant when it did arrive there; that soon after passing that town he discovered that he was being carried beyond his destination, and when the train was about two hundred and fifty yards north of the town and depot of the company he informed the conductor of the fact and requested him to stop the train and allow him to alight, which he could have done safely had the request been complied with; that the conductor angrily

1. Cited in Cent. R.R. v. Kitchens, 83 Ga. 82, 88; Poole v. East Tenn. etc. R.R., 92 Ga. 321, 338.

inquired why he had not left at the station, and did not then stop the train, but after it had passed about one mile north of the station, and while the cars were moving rapidly, commanded the plaintiff to jump from the platform of one of them, and on plaintiff's demurring to this, the conductor informed him that he would not stop the train or further check its speed, assured plaintiff that he could jump from the platform safely, repeated his order to do so, and pushing plaintiff outward from the steps, compelled him to jump from the moving train, from which he was thrown off a trestle or culvert a distance of twelve feet or more, whereby he was injured. The extent and character of his injury will appear from the report of the evidence. On the trial (which seems to have been a second one) the testimony of the plaintiff showed, in brief, as follows: He bought a ticket at Valdosta to go to Camilla on a night passenger train; he did not know when it reached Camilla until after it passed that town, because he was asleep. A "little piece" above Camilla he woke up, went to the conductor and asked him if they had got to Camilla; the conductor replied yes, they had just passed it; that he would put plaintiff off out there. He jerked the bell-line, and the two went out on the steps, and the conductor told plaintiff to "hop off." Plaintiff said he did not want to hop off. The train was going along. The conductor said, "Hop off, it won't hurt you; I don't want to stop my train." He put his hand on plaintiff's shoulder, and he fell to the ground in a damp, sandy place which had a trestle over it; and the train did not stop. He did not bound or fall over, but squatted or sat on his left foot in the place where he struck. The plaintiff's left leg was broken so badly that it had to be amputated fifteen or sixteen days afterwards; he suffered greatly. Before this he had earned \$4.50 per week and his board as a teamster, and also made crops in farming. Before the injury he was healthy and did good work, but can do little, if anything, since. When the plaintiff fell the speed of the train had slackened somewhat, and it was moving, as he thought, about eight or ten miles an hour. Neither the conductor nor anyone else had any light. No one aroused plaintiff and told him that they were approaching Camilla. A small swallow of gin, taken about three o'clock in the afternoon, was all the intoxicating liquor he had drunk that day, and he was sober when hurt. He

was, in part, corroborated by two witnesses, whose testimony tended to show, among other things, that the station Camilla was not called, and that the train did not stop there.

On cross-examination, one of these (Branch) was asked, and answered, as follows: Q. Didn't you state, in the presence of L. A. M. Collins at your house on the fourth of this month, that Holland was drunk that night, and that the train did stop? A. No, sir, I didn't make any such statements. Q. Didn't you say that he was tipsy? A. No, sir, I didn't say anything to that effect. Q. Didn't you state, in the presence of Collins at your house about the fourth of this month, that the train did stop when Holland got off? A. I stated to him that the train stopped; he asked me if the train stopped, and I told him that it did; but he didn't ask me where, and I didn't say where. Q. Didn't you tell Collins that the train stopped when Holland got off? A. No, sir; he asked me if the train stopped; we were talking about the case one way and another, and he simply asked me if the train stopped, and I said yes, but I didn't say where. Q. You say, then, that you didn't tell Collins, at your house on the fourth of this month, that the train stopped when Holland got off? A. No, sir; here was the way it was: there was a man there by the name of Mr. H. M. Hitt, who came with Mr. Collins, and that night Hitt got to talking about the case; Mr. Collins is a resident of this county here; and Hitt said to me—Here counsel for defendant interrupted, saying, "Never mind what Hitt said." Counsel for plaintiff insisted that the witness had the right to explain, and the judge so ruled. The witness then explained, in substance, as follows: Hitt said to me, I can make some money out of this railroad, and asked me if I could not be induced to stay away from court. I told him I did not expect to come to court any way. He said he could make a lot of money out of this thing if he could get me to stay away from court. I just nodded my head to him. He said, we want to make this statement for the railroad: that the train stopped and that Holland was drunk. I nodded my head to him, and never said that Holland was drunk or that the train stopped. He asked me if I would not do that—if I could not be induced to stay away from court. I told him that I did not expect to go to court any way, as I could not leave my family. It was all in the presence of Collins, who said noth-

ing. Hitt said he could make \$1,500 to \$2,000, and would give me half of it to stay away from court, provided he could work it right, and would be back in seven or eight days and see me about it. I said nothing to him, only nodded my head. Then Hitt asked me what I would ask to make a misstatement in the case—to swear in the presence of Collins that the train stopped. I told him that I would not do it, but would swear to the truth, as I did on the first trial. The next morning Collins asked me if the train stopped, and I told him yes, but I did not say where at. When they came the night before, they fetched a jug of liquor with them; it was "railroad whiskey," they said; and tried to get me to drink and talk about the railroad. This was admitted over objection of counsel for defendant. Branch further denied that he had said anything about plaintiff's being drunk.

A witness for the plaintiff (Rackley) testified that, between 12 and 1 o'clock, he heard the plaintiff's cries for help, and went to him, reaching him in about half an hour, and that plaintiff commenced to tell him how he got his leg broke. Counsel for defendant objected to the admission of plaintiff's statement. The court admitted it as a part of the *res gesta*. Rackley then testified that plaintiff said that the conductor took him to the door; that the train was nearly stopped, but did not stop, and when he got to the door it was going faster; that he told the conductor that it was going too fast for him to get off, and the conductor told him it was not, put his hand on his shoulder, told him to jump off quick, and pushed him, and he fell and broke his leg; and that he cried to the conductor to stop and take him on, but they were going so fast he did not know whether or not he was heard.

The evidence for the defendant showed, in brief, as follows: The conductor took up plaintiff's ticket, and when the train was within about a mile of Camilla, woke him and told him the next station was his, and the plaintiff replied "All right." Just before reaching the station the train hand called it out; the train stopped at Camilla three or four minutes; after leaving, the conductor again entered the car, and on seeing plaintiff, asked him why he did not get off. The plaintiff replied he had been asleep, and asked how far it was from Camilla, and on being told it was about half a mile, he asked to be allowed to get off. The conductor

pulled the bell-line and the train soon came to a dead stop. The conductor stood on the steps of the platform, lantern in hand; the plaintiff stepped off on solid ground about two and a half feet from the car step; then the conductor waved his lantern and the train moved on. Nothing more was seen of plaintiff, and no one on the train knew of his being hurt that night, nor until some time afterwards. The conductor did not touch the plaintiff; the place where he alighted was beyond the trestle and the train had passed over it, the engine being three hundred feet from it, and the remainder of the train consisting of three coaches; the train stopped fifteen or twenty seconds. A witness testified that he looked out the rear of the last coach when the train stopped, and the trestle was a number of feet back. About thirty-six hours after the injury, a witness made a plaster cast of the tracks found in the soft, damp clay, below the trestle, about three feet away from it on the west side; these tracks pointed southwestwardly from the railroad track; the left one seemed to be deeper than the right, which appeared as if the left knee had slid over it, or rested in it; the left heel seemed to go deeper than the ball of the foot. This witness testified that he compared the plaintiff's shoe with one of these tracks, and it fit it. Some of the testimony for the plaintiff tended to show that these were his tracks. There was testimony to the effect that plaintiff must have been thrown forward if the train had been moving, and could not have remained in the spot he struck. Collins, a witness for the defendant who has before been referred to, testified that Branch had stated to him that the plaintiff was tight or drunk. He further testified that on the occasion of his and Hitt's visit to Branch, nothing was said in witness' presence about any money to be made if Branch should testify differently from what he had done; and that what Branch said to them he said voluntarily. Much evidence, including mortality tables, was introduced by both sides, but the above seems to contain the material facts.

The jury found for the plaintiff \$4,165. The defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence; and by amendment the following grounds were added:

1. After charging, at the request of defendant, that Branch's testimony as to Hitt's saying that the whiskey was railroad whis-

key was hearsay and could not be considered as tending to show that the defendant had anything to do with the whiskey, nor could the jury consider Branch's testimony as to propositions for him to stay away from court or to change his testimony as tending to show any attempt on the part of the company to get him to stay away or to change his testimony, and that if Hitt made any such propositions the company would not be responsible for them, the court added this charge: "The presumption is that the defendant, the railroad company, did not authorize them, unless the evidence shows that the defendant authorized him to make such propositions. The presumption is always with the honesty of both of the parties, and would be in favor (of the presumption) that the railroad did not authorize him, unless the evidence shows and satisfies the jury that they did authorize him." Error, because there was no evidence from which the jury could legally find that Hitt was authorized by the company to make the statements and propositions referred to.

2. The court charged thus: "I charge you that you are not to take in evidence, as stated, the plaintiff's declaration; it is only the pleadings in the case, and the proof must be outside of the pleadings; that is, the plaintiff's declaration is no proof; you must consider the case upon the evidence submitted before you." Error, because the defendant contended that the jury might consider the statements of the declaration, especially as to his requesting the conductor to stop the train and put him off, as admissions.

3. The court charged: "In determining that, you will see what his occupation was beforehand, what he could make and what his capacity was; it is not for the court to say what he could make or what his capacity was; it is for you to see what he was making and could make before he received the injuries, and see what he could make or is capable of making since receiving the injuries, and give him the difference." Error, because, if the jury found for the plaintiff, they were required to give him the difference between what he could make before he was injured and what he could make afterwards, without reducing such difference to its value at the time the verdict was rendered.

4. The court charged: "If you should find from the evidence that the defendant's employee, the conductor, pushed the man off of the train and caused the injuries, and that he did it intention-

ally; that he used rude and rough conduct towards the passenger, another character of damages would enter the case, what is called in law punitive damages, and what is called a punishment for the defendant for intentional bad treatment that the plaintiff received at the hands of the defendant. The character of damages, however, would be based upon intentional bad conduct alone. If the injuries were received by the plaintiff without any bad conduct on the part of the defendant, intentional bad conduct, then this character of damages would not be assessed. You will look to the evidence to see how that was. But if the defendant (when I say defendant I mean the employees and servants of the defendant) was rough, rude, violent or anything of that sort towards the plaintiff, and pushed him off of the train intentionally, then the character of damages would also rise in the case, to be fixed by the jury at whatever they thought would be right and proper for that character of damages." Error, because, under the declaration, the plaintiff did not claim punitive damages.

5. The court erred in admitting the testimony of Branch, which is above set out; the objection being that it was irrelevant, and that it did not appear that Hitt was in any way connected with the defendant.

6. The court erred in admitting the testimony of Rackley, as above set forth; the objection being that the statements of Holland, which were thus introduced, occurred too long after the injury to be a part of the *res gestæ*.

The court certifies that the first and third grounds correctly recite part of his charge, but not the whole of the charge upon those subjects. He overruled the motion for a new trial, and the defendant excepted.

CHISHOLM & ERWIN and S. T. KINGBERY, for plaintiff in error.

W. M. HAMMOND and SPENCE & TWITTY, for defendant in error.

Bleckley, Ch. J.—1. The plaintiff below, Holland, being a passenger upon the train, was carried past the station at which he wished to stop. Discovering the fact, he requested the conductor to let him off, and a vital question in the case was whether he alighted safely and received the injury afterwards, by falling through a trestle on his way back to the station, or whether he fell through the trestle in alighting, by reason of being forced or

pushed off at that point by the conductor. There is no doubt but that he was seriously injured by his fall, his leg being broken. No one witnessed the fall. He testified in his own behalf, and made a case of gross negligence against the company. The evidence of another witness was admitted, over objection, as to what the plaintiff said in giving an account of the manner of his leaving the train and receiving the injury. When these declarations were made, the plaintiff had pulled off his coat, detached his suspenders, bound up his broken limb, crawled through a culvert from one side of the railway to another, seated himself on the cross ties and cried for help. It was late at night. A person who heard his cry reached him about half an hour after first hearing him. To this person the statement was made; and the question is was that statement a part of the *res gestæ*?

We think it was not. The Code, § 3773, declares that "Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of *res gestæ*." It is manifest that the act by which the plaintiff was injured had completely terminated before his declarations were made, and that they were no accompaniment of the same. Were they so connected with it in time as to be free from all suspicion of device or afterthought? He had turned his attention from the act to measures looking to his own safety and comfort. He had certainly occupied his thoughts with something besides the facts and circumstances to which his declaration related. He had full opportunity, although no doubt under great suffering, to devise a story in his own interest, and there is no reason for concluding that he did not have capacity to take advantage of his opportunity. He was exposed to the temptation of fabricating a story, if he needed the aid of invention, and the exposure was under circumstances calculated to excite suspicion that his statement was, or might have been, referable to deliberation and afterthought, rather than to spontaneous or instinctive utterance. This does not imply that he did fabricate, for he might not have done so; truth may have been with him and invention unnecessary. But as his declarations did not accompany the act, they had to be so nearly connected therewith in time as to be free from all suspicion of device or afterthought. *Hall v. State*, 48 Ga. 607. If subject to suspicion at

all they were not admissible, although in the particular case the suspicion might be erroneous. In *Augusta Factory v. Barnes*, 72 Ga. 218, the injured person was a child 14 years old, and she died from the injury. Her declarations, made half an hour after the injury was received, were admitted in evidence upon the ground that they were free from suspicion, this court saying, "It is scarcely credible that this little girl, while enduring such excruciating pain—perhaps torture would not be too strong a word to characterize it—from this frightful wound, would have been capable of framing a story with a view to her ultimate advantage of gain, or for any other ulterior purpose." In considering that case afterwards, in *Aug. & Summ. R.R. Co. v. Randall*, 79 Ga. 311, in which latter case the declarations of a mature woman, not more remote in time, were held admissible, the court said: "That case must rest alone upon its own peculiar facts, and will not be extended beyond them. . . . The proximity of time in which declarations are made to the main transaction is not the only test of their admissibility in evidence, but they must also be free from all suspicion of device or afterthought." It is obvious that upon this requisite of freedom from suspicion, the age and discretion of the speaker must be of very considerable importance. We think the doctrine recognized generally by courts, others as well as our own, would require the exclusion of the evidence in this case. A somewhat thorough discussion of the subject will be found in the opinion of Earle, J., in *Walden v. N. Y. C. etc. R.R. Co.*, 95 N. Y. 274, the facts of which were quite as favorable for the admission of the evidence as are those of the present case, and it was ruled inadmissible. An excellent chapter on the topic will be found in *Wood's Prac. Ev.* 413 to 480. And see *Meacham on Agency*, § 715. Inasmuch as the evidence of the plaintiff and that of the conductor differed to the degree of direct antagonism upon the principal facts in issue, any illegal evidence may have turned the scale; and the declarations of the plaintiff being, as we have seen, inadmissible, we think a new trial should be had. For this reason the judgment denying a new trial is reversed.

2. The witness Branch, on cross-examination, was interrogated as to conversation in the presence of Collins, and as to conversation addressed to Collins. This was with a view to laying the foundation for impeaching him by the testimony of Collins. His

answers, without the explanation which he was allowed to super-add, would not show that he might have been misunderstood by Collins as to the former conversation. With the explanation, the answers show plainly that Hitt did the talking or the most of it, and that Branch responded by nodding his head several times, without expressing himself in words. What Hitt said was pertinent to the subject matter to which the cross-examination related, and the nodding of the head by the witness was perhaps ambiguous, meaning either that he understood what Hitt said, or that he assented to some of it as representing the truth of the case. The latter construction might have been put upon it by Collins, and the jury would not have known whether this was correct or not had not all the facts and circumstances of the conversation been brought to light as the witness detailed them. Indeed, without some of the explanation, they would not have even known that Branch expressed himself in this way at all. Whether Hitt was an agent of the company to talk as he did, is quite beside the question; for the company sought to affect the witness by the part he, the witness, took, or was supposed to have taken, in that conversation, no matter who or what the other interlocutor was. He had a right to show what the part attributable to himself really was, and in order to do so, under the peculiar circumstances, it was necessary to detail all or much of what Hitt said. The general rule as to bringing out the whole of the pertinent matter of a conversation where a part of it is touched upon, is applicable to the present case with peculiar force, for here the conversation was conducted on one side by words and on the other chiefly by signs alone.

3. Hitt talked very improperly, and with an evident purpose to corrupt his host, Mr. Branch, as a witness. Collins was with him to hear what was said, and both, it seems, were sent by Bush, Esq., one of the company's counsel, to get up evidence to be used in the case. It does not appear in express terms that the company or that Bush directed or authorized the use of any improper means in the business of getting up evidence, but there can be no doubt that to obtain evidence and prepare for trial is within the scope of the powers of an attorney employed in the defense of a pending case. If Bush himself had used the means to suborn evidence which Hitt used, the fact of his so doing would,

it seems to us, have been admissible in evidence ; and if so, we see not why Hitt's conduct under Bush should not be admissible. The court charged fully and fairly as to the presumption that the company was free from complicity in the unlawful and improper conduct, but left the question to the jury as to how the matter really was, both in respect to the agency of Hitt and his authority from the company to conduct himself towards the witness as he did. There was no proof from Bush or any other witness that Hitt had transcended his authority, and this, together with all the facts and circumstances, could be considered by the jury. The evidence warranted the reference of the whole matter to the jury for their appraisal of its import and value as a factor in the general case.

4. The point made that punitive damages could not be recovered, because they were not claimed, *eo nomine*, is wholly without merit. The declaration lays damages at \$10,000 and alleges a tort, with circumstances that may well be considered as an aggravation. The Code, § 3066, declares, "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff." It certainly cannot be necessary for the plaintiff to set out in his declaration, in so many words, that he claims some or all of his damages as punitive. All he has to do is to make a case by his pleading and evidence which will entitle him to such damages in addition to those actually sustained.

We find no error in the record save as indicated in the first division of this opinion.

Judgment reversed.

THE COAST LINE RAILROAD CO. v. BOSTON.

Supreme Court, Georgia, July, 1889.

[Reported in 83 Ga. 387.]

PLAINTIFF STEPPING OFF STREET CAR THROWN TO GROUND BY SUDDEN START. — Where the plaintiff testified that she boarded a street car of defendant to place a child in the care of a passenger and so told the driver, and started to get off the car, which had begun to

move, but it was stopped by the driver, and as she stepped to the ground the driver whipped up the mules, starting the car with a sudden jerk, which threw her to the ground and injured her, and witnesses for the defendant testified that she attempted to leave the car while it was moving without notifying the driver, and that the car was not stopped, there was sufficient evidence to sustain the verdict for the plaintiff, and the sum found, viz. : \$1,240, was not excessive.

FROM the City Court of Savannah.

On October 24, 1887, Belle Boston sued the railroad company for damages. Her testimony tended to show as follows : About half-past nine o'clock at night, she boarded a street-car of defendant to put her daughter on, intending to at once leave the car herself and walk home. The rear platform of the car was crowded, so she got on the front platform, which was not an unusual thing for passengers to do ; told the driver, who was a boy, that she was going to put the child on and then get off ; saw her sister in the car and put the child in her custody, and without entering the car started almost immediately to get off. In the mean time, the car had gone for a little distance, but before plaintiff started to get off the driver stopped the car for her. She stepped first from the platform to the first step with her right foot, held to the guard-rail with her right hand and put her left foot to the ground, her right foot being still on the step ; when in the act of stepping down with her left foot, the driver whipped up the mules without any notice, and the sudden jerk of the car threw her around against it and she fell. She held on to the guard-rail with her right hand, which caused her left arm to be thrown under one of the wheels of the car, where it was badly mashed ; she was dragged a little distance. She was about two months with child at the time she was hurt, and had a miscarriage afterwards caused by this shock and injury. Before she was hurt, she washed and ironed for a living, averaging \$35 a month after paying expenses. She was hurt on the 28th day of November, 1886, and did not get able to work again until March, 1887, and then went into service at \$12 a month, but could not do the work, and her wages were reduced to \$8 or \$10 a month. When she started off the car, she and the driver were the only persons on the front platform ; the rear platform was so crowded she could not enter or leave the car by that platform. Her physician, Dr. Nichols, testi-

fed, among other things, that he examined her the night she was hurt; found the skin torn off the arm, the flesh and muscles of the arm mashed and bruised, and the bone of the upper arm scraped as if between two flat surfaces; the wound was a complicated one and did not heal; she suffered great pain and had hysterical attacks; the tissue around the bone was destroyed, and it caused the bone to decay partially and to emit an offensive odor; partial death of the bone ensued; abscesses formed and had to be opened with a knife several times, and the nerves of the arm were injured, which weakened the grasp of the little finger and the finger next to it. He testified that the injury would more or less affect the use of the arm for life; that he could not state what proportion of the capacity to work she had lost; that the bone at present, so far as appearances were concerned, was as strong as ever, but the strength was not there; the offensive odor ceased when the wound healed; she can move that arm freely now; women generally take the right arm to iron, and she could use the right arm as well as if she had never received the injury, so far as motion was concerned, etc.; and that his bill was \$75, which had not been paid. He attended plaintiff three days in November, and after that daily until December 20, 1886, and regularly, but not so often after that, until the second day of the following February. He did not testify as to the miscarriage.

The testimony for the defendant tended to show that plaintiff got in the car and then started out, and without giving notice to the driver, jumped off while the car was in motion, by reason of which she received her injury. The conductor of the car testified that, immediately after the accident, he asked her why she had jumped out while the car was moving, and that she said that it was going so slow she thought she could get off without hurting herself, etc. One Haygood testified, among other things, that he was on the front platform when plaintiff passed out of the door by him behind the driver, and, putting one hand on the guard-rail, jumped off with both feet and fell; that she may have stepped on the lower step, but if she did, it was with a motion so quick that he could not see any step; that she did not ask the driver or anyone else to stop the car; and that the driver did not strike the mules at all, but they were going along at a slow gait. Another witness for the defendant testified, among other things,

that it was his best recollection that the car was moving all the time after he noticed plaintiff going towards the front door, until she had fallen; that he did not see the driver strike his mules; did not feel any jerk of the car at that time, etc. The driver testified that he was driving slowly; that plaintiff did not ask him to stop the car for her to get off; that he did not know she wanted to get off; that he did not know she had fallen until he felt the jolt; that he did not strike the mules at the time; and that he felt her touch him as she passed behind him, but did not know she was going to get off.

There had been a former trial of the case, upon which substantially the same evidence had been introduced as on the latter trial, except that the plaintiff had introduced the Carlisle tables of expectancy and annuity, but did not introduce them on the second trial; and there was no testimony at the first trial as to a miscarriage. On that trial, the jury found for plaintiff \$1,250. The defendant moved for a new trial on the grounds that the verdict was contrary to law and evidence, and was excessive; and a new trial was granted. On the second trial, the verdict was for the plaintiff for \$1,240. The defendant again moved for a new trial on the ground that the verdict was contrary to law and evidence, and was excessive; and because of the newly discovered evidence of R. E. Cobb.

The affidavit of Cobb in support of the last ground was substantially to the effect that, after the last trial, Dr. Nichols told him that if plaintiff had had any miscarriage, he did not know it, and she must have bundled it up and thrown it out without his knowledge; and that subsequently, Nichols told him he had, at each call made on her during her sickness, written down an account of the call, and there was no charge for any miscarriage on his books nor any mention of anything of the sort. In rebuttal of this affidavit, plaintiff produced the affidavit of Dr. Nichols. He swore, in substance, that in answer to the inquiry as to miscarriage in the first conversation, he told Cobb that it was just as likely that plaintiff may have had a miscarriage as not, and may have spoken to him about it, but he simply did not recollect; did not say that he had the details of each call written down and there was no charge for miscarriage; he may have said he had no record of any miscarriage; in the second interview went into an explana-

tion with Cobb as to how a woman could miscarry at an early period without the knowledge of her husband, etc. Affiant further swore that, in all probability, plaintiff did mention to him her miscarriage; that he simply does not recollect; that such a circumstance, when at such an early period, would not impress itself on his memory, especially after two years.

The motion was overruled, and defendant excepted.

JAMES ATKINS, for plaintiff in error.

R. R. RICHARDS and W. R. LEAKEN, for defendant in error.

Simmons, J.—Boston sued the railroad company for personal injuries, and recovered a verdict for \$1,240. The defendant made a motion for a new trial, on the grounds that the verdict was contrary to law, to the evidence and to the charge of the court, and was excessive, and upon the ground of newly discovered evidence. The motion was overruled by the court, and the defendant excepted.

1. There was sufficient evidence to sustain the verdict of the jury.

2. Under the facts in the record the verdict for \$1,240 was not excessive.

3. There was no error in overruling the motion for a new trial upon the ground of the newly discovered testimony of Cobb. Cobb's affidavit was rebutted by the affidavit of Dr. Nichols.

Judgment affirmed.

COLEMAN v. THE GEORGIA RAILROAD AND BANKING CO. (1)

Supreme Court, Georgia, November, 1889.

[Reported in 84 Ga. 1.]

PERSON ENTERING TRAIN TO ASSIST PASSENGER TO SEAT—RAILROAD NOT NEGLIGENT IN NOT GIVING SIGNAL OF DEPARTURE.—One who gets upon a fast mail train during one of its fixed stops at a station, where these stops are too short for him to transact his business and get off, has no right to notice, by signal or otherwise, to alight before the train resumes its journey; it not appearing that the conductor or other proper agent knew that he had come aboard, nor that

1. This case controls *McLarin v. Atlanta & W. P. R. Co.*, 85 Ga. 504. See p. 443, *post*.

there was any usage or custom to give notice or make signals for the benefit of such visitors. This applies to a father who, in conformity to a known custom of travel, attends his daughter at her request, under circumstances rendering such attendance necessary, to aid her and her infant children to enter the train and procure seats as passengers. If, whilst he is in the car, the train starts before he has finished his undertaking, he must either remain until he can make known his wish to get off, or take the risk of alighting whilst the train is in motion.

FROM Walton Superior Court. The facts are in the opinion.
ROGERS & UPSHAW, for plaintiff.

J. B. CUMMING and H. D. MCDANIEL, for defendant.

Bleckley, Ch. J—The material allegations in the declaration were these: Plaintiff bought a ticket for his daughter and two children, one three years, the other eight months old, from Social Circle to Atlanta. When the train known as the fast mail reached Social Circle, he aided her and the children to get on the train, and went in the car to see that she and they were comfortably seated. This it was proper for him to do on account of the age of the children, and because his daughter had no assistant and was carrying a couple of bundles or boxes, and because the conductor did not offer to aid her. Plaintiff did not have a reasonable time to seat his daughter and children and get off the train before it started. Before he could seat her, and without allowing him a reasonable time to do so and get off, the train suddenly started without blowing the whistle of the engine, or otherwise giving him notice that it was about to start. So soon as he discovered the train was in motion, and while it was moving very slowly, he started to get off. He walked out of the car onto the platform, then stepped down to the bottom step, and whilst the car was moving very slowly, stepped off upon the ground, as he thought, but it may have been upon something negligently put there by the company. He used all ordinary and reasonable care and diligence in stepping from the train, was in the full possession of his physical vigor, and had no baggage to encumber him; and his getting hurt was the result of no fault on his part, but was the result of negligence on the part of the company in not giving him a reasonable time to get on and off the train, in starting without giving notice, in not providing proper persons or assistants to aid passengers on the train, in fixing the stop at the station too short, in

having a very rough right of way by throwing in round rocks, in suddenly jerking the cars as he was about to step off, and in other respects. By amendment to the declaration, these averments were added: By the time plaintiff, with his daughter and her children, got inside the ladies' car, the train started without giving any signal, and without giving him a reasonable time to put his daughter and children on board the cars and get off before the train started. He had a right to attend his daughter and children into the car where she was to be conveyed, being requested by her to do so, and it being necessary for him to get on board to safely place them. He had a right to be there, and to be duly notified by signal or otherwise of the starting, so that he could pass therefrom with safety. By gross negligence the train was started without giving him any such signal or other notice, and he was injured without any negligence on his part in attempting at the time the train started to pass from it to the platform. He was injured by the negligence of the employees and agents for the company. It was the custom of female passengers to have assistants to see them safely on and off the cars, which was known to the company and not objected to. The injuries were described, and damages were laid at \$5,000. The company demurred generally to the declaration. The court sustained the demurrer and dismissed the action.

It is not alleged in the declaration that either the company or any of its agents or employees had notice that the plaintiff was upon the train, or that he desired to get off; nor is it alleged that it was usual or customary for the company to make signals in order to warn persons to get off who might have come as attendants upon female passengers and not to be carried as passengers themselves. Although it is alleged that the conductor offered no aid, it is not alleged that the conductor was present at the time and place when and where the plaintiff and his daughter boarded the train, or that he even saw them. Tested by *Lucas v. Taunton & New Bedford R'y Co.*, 6 Gray, 64, the plaintiff was not entitled to recover. There it was held that the person coming on board with an infirm passenger was not entitled to special notice, and the evidence was conflicting as to whether usual and customary notice, by ringing bells, crying "All aboard," etc., was given. Tested by *Doss v. Mo. etc. R.R. Co.*, 59 Mo. 27, the right

to recover would be very doubtful, for there it is said it was the plaintiff's business to make himself acquainted with the usual delay of the train at the station, and with the usual signal for the starting of the train, and if that signal was given in time for the plaintiff to have left the cars his delay was at his own risk. This implies that there was some evidence in the case to the effect that there was a usage in the matter of giving signals. Here, as we have said, there is no allegation that such a custom existed. It is alleged that the train was a fast mail, and that the fixed stop at Social Circle was too short. There is no intimation that the plaintiff did not know what the fixed stop for that station was before he entered the cars, or that he did not know it was too short. If he had such knowledge he should have requested an extension of the stop for that occasion, or at least have given some notice that he was going aboard and desired to get off. This notice he might at least have given to the ticket agent from whom he bought the tickets, if not directly to the conductor. Tested by the case of *L. & N. R.R. Co. v. Crunk* (Ind.), 21 N. E. Rep. 31, the plaintiff here could not recover, because in that case the conductor either knew, or should have known from what he saw, that the invalid passenger came on board by the aid of attendants. Here there is no allegation whatever of any communication with the conductor, or any knowledge by him or any other agent of the railroad company that the plaintiff would or did attend his daughter in boarding the cars and becoming seated. So far as appears, no act done by the plaintiff after he purchased the tickets took place in the sight or hearing of any agent or employee of the company. Under such circumstances we cannot hold that any act or omission alleged in the declaration, or that all of them put together, constituted a breach of any duty which the company owed to the plaintiff. The dictum in *Stiles v. Atlanta & West Pt. R.R. Co.*, 65 Ga. 375, to the effect that a person on board for certain purposes might have all the rights of a passenger, is (if law at all) to be restricted to persons who are on board with the knowledge of those agents or servants of the company whose diligence is charged with their safety. *Griswold v. Chicago & N. R.R. Co.* (Wis.), 23 Am. & Eng. R.R. Cases, 463; s. c., 26 N. W. Rep. 101. With such knowledge the weight of authority would seem to be that ordinary, not extraordinary, dili-

gence would be the rule. But even in the case of a passenger there would be no requirement upon the company to allow him time to get off at a particular station unless he made it known, or it could be known from his ticket or otherwise that he desired to get off there.

We conclude that the court committed no error in sustaining the demurrer and dismissing the action.

Judgment affirmed.

WHELAN v. THE GEORGIA MIDLAND & GULF RAILROAD CO.

Supreme Court, Georgia, March, 1890.

[Reported in 84 Ga. 506.]

PASSENGER JUMPING FROM TRAIN TAKEN IN MISTAKE CANNOT RECOVER DAMAGES FOR INJURIES.—Where a passenger took a wrong train by mistake, and after going a few yards discovered his mistake and requested the servants of the railroad company to stop the train so that he might get off, and they failed to do so, and the passenger jumped from the train while it was in motion and was injured, he cannot recover.

JUDGE'S CHARGE, THAT PASSENGER VOLUNTARILY JUMPING FROM MOVING TRAIN CANNOT RECOVER, NOT ERROR.—

A charge, that if the passenger was left free to exercise his own volition to remain on the train or to get off, and he got off, he would not be entitled to recover damages for an injury received, is not error.

FROM Muscogee Superior Court. The facts appear in the opinion.

THORNTON & CAMERON, for plaintiff, cited: Code, §§ 2067, 3368; 67 Ga. 307, 468; 58 Ga. 468; 71 Ga. 22; R'y Ac. L. §§ 110, 220; 8 Am. Rep. 508; 10 Id. 332; 27 Id. 385; 40 Id. 228; 41 Id. 337; 99 Am. Dec. 287.

GOETCHIUS & CHAPPELL, for defendant, cited: Code, §§ 2972, 3034; 78 Ga. 35; 82 Ga. 229; 81 Ga. 476; 80 Ga. 212; 76 Ga. 333; 66 Ga. 746; 50 Ga. 353; 67 Ga. 306; 45 Ga. 288.

Simmons, J.—Whelan brought his action against the defendant for damages on account of a personal injury, which he alleged he sustained by the negligence of its servants. It appears from the record that at Columbus, Georgia, when on his way home

from Alabama to Butler, Georgia, he took by mistake the defendant's train, instead of the Central Railroad train as he had intended. After going a few yards, he discovered he was on the wrong train, and requested the defendant's servants to stop the train so that he might get off; but instead of their doing so, he alleges, they ordered him to get off while the train was in motion, and he was forced off by violence, and in jumping from the train was injured.

The defendant, 1, denied that Whelan was on the train at all, and, 2, contended that if he was on it, he jumped from it voluntarily, without any order or force on the part of the defendant's servants. The jury found for the defendant, and the plaintiff moved for a new trial.

1. The first, second and third grounds are, that the verdict was contrary to law and the evidence. We have examined the evidence sent up in the record, and we think it was simply sufficient to authorize the verdict; indeed, the preponderance is in favor of the defendant.

2. The fourth ground complains of the following charge: "If he got off of his own volition, without being ordered off and without being commanded to get off by an employee of the company, and was left free to exercise his own volition to remain there or to get off if he pleased, if he got off of his own volition, he would not be entitled to recover damages, for in such cases he would be left free to act as he pleased about it."

There was no error in this charge; it seems to us to be a sound exposition of the law. We cannot conceive how a railroad company would be liable to any person who jumped from its train when there was no necessity for so doing.

3. The fifth ground complains that the charge of the court did not fully cover the case made by the proof and the declaration. This ground is too general for consideration; but in reply to it, we will say that we have read the charge of the trial judge and find that it covers all the issues made by the pleadings and the evidence, and that the plaintiff's case was as fully presented therein as he was entitled to.

Judgment affirmed.

THE AUGUSTA & SUMMERVILLE RAILROAD
COMPANY V. RANDALL. (1)

Supreme Court, Georgia, April, 1890.

[Reported in 85 Ga. 297.]

ALIGHTING FROM HORSE CAR WHILE IT WAS IN MOTION—

JUDGE'S CHARGE.—In an action for injuries where the evidence was conflicting and that of the plaintiff tended to show that she rang the bell of the horse car, and it stopped, and she went out of the rear door with bundles in her arms, and as she was about to alight from the last step, the car was suddenly jerked forward, throwing her down and injuring her, and the court charged that if the plaintiff "did not ring the bell or cause any signal to be given to stop the car, and alighted from the car, as the company claim, while it was in motion, and she did not exercise ordinary care and caution, the company is not liable in damages, *provided* you believe the company was free from negligence," it is not error.

VERDICT.—On a previous trial the jury returned a verdict for \$1,000; on the second trial a verdict for \$2,000 was not excessive.

WHERE REMARKS OF COUNSEL PREJUDICED MINDS OF JURY A NEW TRIAL WAS GRANTED.—In the argument before the jury, where the defendant's counsel referred to the inability of the defendant to procure a certain witness that the plaintiff's counsel had claimed the defendant's agent had conversed with, after the witness had promised to testify in the interest of the plaintiff, and the plaintiff's counsel in his argument said that he believed the witness would have been present, but for the defendant tampering with her, and characterized her as the plaintiff's strongest witness, the court *held*, that the remarks of plaintiff's counsel were calculated to prejudice the minds of the jury against the defendant and a new trial should have been granted.

THE facts appear in the opinion.

FRANK H. MILLER and J. S. & W. T. DAVIDSON, for plaintiff in error.

TWIGGS & VERDERY, for defendant in error.

Simmons, J.—Randall and his wife sued the railroad company for damages sustained by reason of Mrs. Randall being thrown from a horse car, and they recovered a verdict against the company. A motion for a new trial was made upon the several grounds set out therein, which will be found in the official report.

1. There was no error in excluding the affidavit made by Miss Klotz shortly after the alleged injury to Mrs. Randall. It was not attached to her depositions as a part of her answers

1. For report of the first appeal in this case, see p. 394, *ante*.

thereto, and was offered as independent evidence, she having testified that the statements therein were true. If admissible at all, the affidavit should have been attached to her depositions and returned with them by the commissioner appointed to take them.

2. There was no error in excluding the testimony of the president of the company as to the degree of care exercised by the officers of the company prior to this accident in the selection of drivers. The question at issue was whether the driver was negligent upon that particular occasion.

3. Nor was there any error in excluding the testimony of a witness upon a former trial, as complained of in the third ground of the motion. The proof as to his death or inaccessibility was not sufficient.

4. There was no error in admitting in evidence on redirect examination of plaintiff the depositions of Annie L. Young, as complained of in the fourth ground of the motion, the objection thereto being that it was not in rebuttal. Whether in rebuttal or not, it was within the discretion of the court to allow it, and we do not think that he abused his discretion.

5. The next ground complains that the court refused to compel two female witnesses to come into court and testify, or to continue the case in order that their interrogatories might be taken. Under the facts, as stated in this ground of the motion, we do not think the court erred in refusing to compel the two females to attend court, or in refusing to continue the case, that their interrogatories might be taken. It was not shown to the court in a proper manner what the witnesses would testify, or the materiality of that testimony. This not being done, the court was right in refusing to compel the witnesses to attend, and in refusing to continue the case. We do not agree with the court, however, in the reason assigned by him for not compelling the attendance of the witnesses. We think every court, in the furtherance of justice, has a right to compel any witness within its jurisdiction to attend court and testify. In the case of female witnesses, we think that some good reason should be shown to the court why it is necessary for the females to attend in person, what they will testify, and the materiality of their testimony. If, upon this showing, the court is satisfied that it is necessary, in the furtherance of justice, for the female witnesses to attend court, he should issue an order

requiring them to attend and testify in the case. The statute does not exempt females from attendance upon court; it simply permits their interrogatories to be taken. But while this is true, this provision of the statute should be followed, unless it is shown to the court that it is necessary to have the personal attendance of the witnesses.

6. The sixth ground of the motion recites that in the argument before the jury, defendant's counsel stated that they had heard what had transpired in reference to Mrs. Bunch's testimony; that he was unable to say what effect that testimony would have had, but desired to call the attention of the jury to the fact that defendant and its counsel had done everything in their power, as the jury saw, to have her brought into court, as they deemed it of great importance to have had her present. In conclusion, counsel for plaintiffs said to the jury that they also were anxious to have had Mrs. Bunch's testimony before them, she and Mrs. Rivers being the most important witnesses they had; that in his (counsel's) opinion, but for the unwarrantable interference on the part of Mosher (the defendant's superintendent) with the witness, Mrs. Bunch, he had no doubt she would have kept her promise and would have been in court promptly that morning; that the methods employed to keep the witnesses away were reprehensible in the extreme; that he exonerated his friend, the president of defendant, of any responsibility, but charged it on Mosher, the superintendent; and that but for this tampering with the witness, he believed that she would have been present. Here defendant's counsel stated that there was no evidence to warrant the statement that Mosher had tampered with the absent witness; to which plaintiff's counsel replied that he did not claim that there was any such evidence, but simply drew an inference from what had transpired before the court and jury. The court said he did not think counsel was authorized to make the statement without evidence; upon which plaintiff's counsel withdrew the statement, and continuing said to the jury: "At all events, gentlemen, I believe before high heaven that if Mr. Mosher had not paid this visit to our witness this morning, she would have fulfilled her promise and would have come to court and testified in the case. It would be improper for me to say what she would have testified to; but we deemed her testimony important, in fact, our most

important witness, and were very anxious to have her present." We think the court erred in refusing to grant a new trial upon this ground. We think the remarks of counsel for the plaintiffs in his concluding speech to the jury were calculated to and doubtless did prejudice the minds of the jury against the defendant. The charge was positively and distinctly made that the superintendent of the defendant had tampered with the plaintiff's witness and had prevailed upon her not to attend court and testify. Although, when corrected by the court, counsel withdrew the statement, he asserted afterwards that he "believed before high heaven" that if Mosher had not paid this visit to his witness, she would have fulfilled her promise and have come to court and testified in the case; that her testimony was most important; in fact, she was the most important witness he had, and he was anxious to have had her appear. There was not a *scintilla* of testimony, so far as this record discloses, that Mosher had tampered with the witness. There was nothing to authorize such a statement save the charge made by counsel in the morning, not under oath, that Mosher had tampered with the witness, which was denied by defendant in like manner. The defendant also sought to introduce Mosher as a witness to testify under oath for the purpose of refuting the imputation cast upon him and his company. This was refused by the court. It is insisted, however, that defendant's counsel was also out of order in his remarks to the jury which are quoted above, and that therefore plaintiff's counsel was entitled to reply. We think the remarks of defendant's counsel were improper, but do not think they justified plaintiff's counsel in his remarks. If he had confined himself to a strict reply to the remarks of defendant's counsel, and insisted only that he, too, desired the presence of the witness, this would not have been sufficient to have authorized and demanded a new trial in this case. But it will be seen that he went much further in his remarks than a simple reply to the remarks of defendant's counsel. He charged the defendant, through its superintendent, with tampering with the witness and preventing her attendance upon the court. This must have been very prejudicial to the defendant in the minds of the jury. Judge Thompson, in his most excellent work on Trials (vol. 1, §§ 963, 965), which is instructive to both bench and bar, lays down the

following rule: "It is scarcely necessary to suggest that, in every judicial trial, a party must present his evidence either by the testimony of witnesses who are under oath, by the exhibition of documents which are competent under the rules of evidence, or by the exhibition of such material objects as are connected with the *res gesta* and speak with reference to the issues on trial. He cannot be permitted to present his evidence in the form of the argument of his counsel to the jury, who is not sworn to speak the truth as a witness in a particular case. All courts, therefore, unite upon the conclusion that where counsel, in their argument to the jury, make statements of prejudicial matters which are not in evidence, it will afford ground for a new trial, unless the error is cured before the cause is finally submitted to the jury, in the manner stated in the preceding paragraphs. It is a necessary part of this rule that the matters thus improperly stated by counsel to the jury in argument should, in view of the issues on trial, the *status* of the parties, their attitude toward each other, and the like considerations, be, in their nature, of a tendency to *prejudice* the cause of the opposing party in the minds of the jurors. Where such statements, though of matters not in evidence and hence improperly made, are *immaterial* or at least *not prejudicial*, they will afford no ground for a new trial. . . . On this subject it was said by Fowler, J., in what has come to be regarded as a leading case: 'The counsel represents and is a substitute for his client; whatever, therefore, the client may do in the management of his cause may be done by his counsel. The largest and most liberal freedom of speech is allowed, and the law protects him in it. The right of discussing the merits of the cause, both as to law and the facts is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his address to the jury it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as learning can make it; and

he may, if he will, give play to his wit, or wings to his imagination. To this freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentences is contempt. This is a matter of course in the courts of civilized communities, but not of form merely. No court can command from an enlightened public that respect necessary to an even administration of the law without maintaining in its business proceedings that courtesy, dignity and purity which characterize the intercourse of gentlemen in private life. So, too, what a counsel does or says in the argument of a cause must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. Now, statements of facts not proved and comments thereon are outside of the cause. They stand legally irrelevant to the matter in question and are, therefore, not pertinent. If not pertinent, they are not within the privilege of counsel.' *Tucker v. Henniker*, 41 N. H. 317. In 1878 this question came for the first time before the Supreme Court of Wisconsin, and it was said by Chief Justice Ryan, in delivering the opinion of the court, that it was to the honor of the bar that this was the case. The counsel who had transcended the bonds of professional propriety, by commenting upon a supposed state of facts not in evidence, was eminent at the bar and of high character; and the observations of the court, while not implying personal censure, give for this reason greater emphasis to the rule which is laid down. The following view was delivered from the bench, in respect of the limits of professional propriety in arguing facts to juries: 'The profession of law is instituted for the administration of justice. The duties of the bench and bar differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but the method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and the right, and outside of the principal object of his profession, when he travels out of his client's case and assumes to supply

its deficiencies. Therefore it is, that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair argument in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudices against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to the prejudice, just or unjust, against his adversary, and *dehors* the very case he is to try. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument. But, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases, of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudices foreign to the case in evidence, exception may be taken by the other side, which may be good ground for a new trial, or for a reversal in this court.' " See, also, the remarks of Lumpkin, J., in *Berry v. State*, 10 Ga. 511, 522; *Forsyth v. Cothran*, 61 Ga. 278. See, also, *Mitchum v. State*, 11 Ga. 615, where this point is fully discussed by Judge Nisbet.

7. The seventh ground of the motion has already been considered. Nor do we think there was any error in the eighth ground of the motion. The meaning of the charge complained of in this ground is, we think, that if the plaintiff, Mrs. Randall, did not exercise ordinary care and caution, she could not recover if the company was free from negligence; but if she was negligent, and the company was also negligent, she might recover.

8. The ninth ground of the motion complains that the judge charged that in a case of this kind the damages must be assessed

according to the enlightened consciences of impartial jurors. This charge is correct where the plaintiff seeks only to recover for injuries to the person and for pain and suffering. If the plaintiff seeks to recover special damages, such as expenses of nursing, physician's bill, medicine, etc., it is error to apply this rule to that character of damages. While the declaration in this case alleges special damages, it seems from the record that special damages were not insisted upon, but that the plaintiff sought only to recover for injuries to the person and for pain and suffering. In this view of it, there was no error in giving the charge.

9. The tenth ground complains that the court charged that any pain and suffering or *sorrow* resulting from the miscarriage, the law says, is an element of damage. We would suggest that the word "sorrow" be omitted from the charge of the court on the next trial. It is most too remote to be considered an element of damage, unless it is that sorrow which accompanies the actual injury and is suffered at the time of the miscarriage. The loss of a child by a miscarriage would affect women so differently that it would be hard for *men*, sitting as jurors, to estimate it as an element of damage; and we therefore think it would be better to omit, in the future, any instruction to the jury upon the question of sorrow as an element of damage. Pain and suffering give a wide latitude to juries, and there are very few complaints made of the smallness of the amounts found by juries upon these two elements of damage. Upon the question of sorrow being an element of damage, see 5 A. & Eng. Encl. of Law, 42; *Bovee v. Danville*, 53 Vt. 190.

10. We see no error as complained of in the other grounds of the motion not herein discussed.

Judgment reversed.

**McLARIN v. THE ATLANTA & WEST POINT
RAILROAD CO.**

Supreme Court, Georgia, May, 1890.

[Reported in 85 Ga. 504.]

JUMPING FROM RAPIDLY MOVING TRAIN IS NEGLIGENCE.—

A person who boards a railway train to assist friends to procure seats, and without asking the conductor, who did not know of the person's presence, to stop the train, jumps from it while it is traveling at the rate of fifteen miles an hour, is guilty of negligence, and cannot recover damages for injuries sustained.

An injury resulting from an attempt to alight from a rapidly moving train will generally afford no cause of action.

This case is controlled by *Coleman v. Georgia R.R. Co.*, 84 Ga. 1, 2 Am. Neg. Cas. 429.

FROM Campbell Superior Court.

H. A. McLARIN sued the railroad company for damages, and on the trial his evidence showed the following: On January 4, 1889, he went with his daughter and two young children to assist them in boarding defendant's passenger train, leaving Fairburn. He was sixty-five years old. They reached the depot nearly half an hour before the train arrived, and were standing on the platform ready to go aboard as soon as it stopped; and they immediately entered the front end of the passenger coach and found seats near that end. They had hardly become seated before the train started to move off, and the plaintiff hurried to the door to leave the car and return to his carriage and horses, which he had left in the street. He reached the lower step of the coach and endeavored as carefully as he could to alight while the train was in motion, but it was going faster than he thought, and as he jumped he was thrown forward upon his head against the ground, turning a somersault. He arose and returned to his carriage, but from the effects of his fall he sustained permanent, serious and painful injuries, rendering him unfit to labor, though before the accident he was strong and accustomed to do much work. He thought he knew how to jump from a train; twenty-nine years before, he was a conductor on this railroad. According to the testimony, the train stopped at the station but a very short time, probably less than a minute. It was thirty or forty yards from

the place where plaintiff and his daughter and the children went aboard, to the place where he fell. He was holding to the iron railing of the coach, and jumped in the same direction the train was moving. He judged afterwards that it was moving at the rate of about fifteen miles an hour. He heard no signal of "All aboard" from the conductor, nor any bell, nor did he see the conductor. These signals are usually given when the conductor is on the outside of the train. Testimony showing the extent of the injuries was introduced.

The court on motion granted a nonsuit, and the plaintiff excepted.

THOMAS W. LATHAM, for plaintiff.

CALHOUN, KING & SPALDING, P. H. BREWSTER and C. W. HARTRIDGE, for defendant.

Bleckley, Ch. J.—The plaintiff went upon the train with his daughter and her children to see them seated. So far as appears, the conductor did not know of his presence there, or of his wish to get off. He heard no signal given for starting the train, but does not prove that the signal was not in fact given. He left the train, knowing it was in motion, and undertook to alight when it was going, according to his subsequent estimate, at fifteen miles an hour. Most probably this estimate is too high, but the important fact is that the speed was unsafe, and so obviously unsafe that he should not have incurred the risk of attempting to get off without waiting to see the conductor and have the train stopped. He owed that duty both to himself and the railroad company, inasmuch as he must have known he was exposing himself, and the conductor did not know of his exposure. Granting that the company was in fault for starting the train too soon, it seems to us, as it did doubtless to the court below, that the plaintiff could have avoided the consequences by the exercise of ordinary care. We think the case is controlled in principle by *Coleman v. Georgia R.R. Co.*, decided at the last term, 84 Ga. 1. (1)

There was no error in granting a nonsuit.

Judgment affirmed.

1. See report of this case on p. 429, *ante*.

PATERSON v. THE CENTRAL RAILROAD AND BANKING CO.

Supreme Court, Georgia, July, 1890.

[Reported in 85 Ga. 653.]

PASSENGER GOING ON PLATFORM OF CAR BEFORE STATION IS REACHED AND INJURED, GUILTY OF NEGLIGENCE.—In an action for injuries, where it was alleged in the declaration that the passenger car in which plaintiff was being carried was attached to a number of freight cars, that caused the train to become of great weight, and when plaintiff went on the platform of the car to be ready to alight at a crossing near the station that the train was approaching at a low rate of speed, the engineer, because of the weight of the train, put on a great force of steam, by which a jerk was given to the train, and plaintiff was thrown to the ground and injured, it was *held*, that the plaintiff's own negligence was the cause of the injuries, and a demurrer to the declaration was properly sustained.

FROM Burke Superior Court.

Action by Paterson against the railroad company for damages; his declaration alleging, in brief, as follows: On the night of May 4, 1889, plaintiff secured of defendant passage over its railroad from Augusta to Waynesboro, paying the regular charges therefor. After the car provided for his conveyance and into which he entered had left the passenger depot at Augusta, the defendant, while yet in that city, attached said passenger car to a large number of freight or box cars, and then, the train being made up, started on the down trip. Owing to the length and weight of the train and insufficient steam-power for rapid transit, the trip was slow and tedious. When nearing Waynesboro and within two hundred or three hundred yards of the depot there, the station was called in the usual way; whereupon plaintiff, being without baggage and knowing that the train would cross Whitaker Street before it reached the depot, upon which street plaintiff resided, went out upon the platform of the car with the purpose of alighting at the Whitaker Street crossing. The train was then moving slowly and at a uniform rate of speed, so that there was absolutely nothing in his situation to suggest danger to even the most cautious. As he anticipated, the speed of the train gradually decreased as it neared the crossing, which was within the corporate limits of Waynesboro and within about one hundred yards of

the depot, where defendant's trains are accustomed to stop to deposit and receive passengers and freight, and where it did stop on the night in question. The plaintiff could see that the place where he intended to leave the car was clear of obstructions, and he stood upon the steps of the platform preparatory to step off when the crossing should be reached. He knew, and defendant's agents and servants on the train must have known, that by reason of the low rate of speed required of them when nearing a depot or public street crossing, especially within the corporate limits of a city, it was customary for people to stand upon the platform, preparatory to leaving the trains; and they knew or should have known that it was not unusual, when a train was passing through cities, for passengers to get on and off at the street crossings; and plaintiff had no reason to apprehend that they would, under such circumstances, negligently imperil the safety of passengers. But while he was so standing upon the steps of the platform in the use of all proper precaution, and as the rear end of the car on which he was standing reached the crossing, the engineer or other servant of defendant, or other person unknown to plaintiff, in charge of or upon the engine, needlessly, unskillfully and negligently put on great force of steam, and the train was jerked forward suddenly and without warning, whereby plaintiff was thrown from his balance and the right side of his head and face came in violent contact with the iron railing to the steps on platform or other parts of the car, bruising and wounding the same, and he was stunned and thrown upon the ground, wounding and bruising him upon the right shoulder, and the wheels of one of the cars ran over his right hand and arm, mangling it so that amputation above the elbow was necessary on the following day.

In another count he alleges that when he went upon the platform of the coach, the train was moving at a low rate of speed and was still decreasing in speed as it neared the crossing; that it was not unusual for passengers to quit platforms under such circumstances at street crossings in cities, and he had no reason to anticipate that defendant's servants, at such a time and place, would be guilty of gross negligence, unskillful management of the train and disregard for the safety of the passengers; but when the rear end of the car had reached the crossing, and he was, without

fault or negligence, in the act or about to leave the car, but before he had done so, the train, by the negligence and unskillful management of defendant's engineer or other person on its engine which was drawing the train, was suddenly jerked forward without warning, and plaintiff was thrown from the steps violently to the ground, injuring him as above set forth; and that this jerking forward, together with other acts of negligence on part of defendant hereafter set forth, was the sole cause of his injuries. He could not have avoided the consequence of defendant's negligence; the situation occupied by him upon the platform and the steps was not under the circumstances a perilous one, or suggestive of danger to his person; and but for the negligence and unskillfulness of defendant, he would not have received the injuries. The failure of defendant to provide proper accommodation and facilities for conveying passengers over its railroad was an act of negligence which probably contributed to his injuries; for if, instead of the train so made up with the passenger coach attached to a freight train of box cars of great weight, the defendant had made up a passenger train of cars such as are usually connected with a train of that character, with the customary improvements and appliances for controlling the same, as it was its duty to do under the law, having exacted of plaintiff full fare for such service, then such a train would have been more manageable; slacks in the couplings would have been impossible; the steam power would have been sufficient to maintain a uniform rate of speed, and the jerk, which was the immediate cause of plaintiff's injury, would not have occurred even with the unskillful engineering. By reason of defendant's negligence in failing to provide accommodation and facilities for passenger travel, and of the negligence and unskillful management of its engineer, servants or other persons on the engine, in the running of the cars, plaintiff has been damaged \$25,000, for which he brings suit.

The action was dismissed, on demurrer, on the following grounds:

1. The declaration is not sufficient in law.
2. It sets forth no cause of action against defendant.
3. It does not show that defendant's agents or servants failed to exercise extraordinary care and diligence in the premises.
4. It shows that plaintiff's injury was caused by his own negligence.
5. It shows that if there was any negligence on part of defendant, plaintiff could, by the exer-

cise of ordinary care, have avoided the consequences thereof. 6. And it shows that he was guilty of such negligence as will necessarily defeat his right to recover. The plaintiff excepted.

TWIGGS & VERDERY and P. P. JOHNSTON, for plaintiff.

LAWTON & CUNNINGHAM and J. J. JONES & SON, for defendant.

Blandford, J.—The plaintiff in error brought his action against the defendant in error, and upon demurrer to the declaration the court sustained the demurrer; whereupon the plaintiff, Paterson, excepted and says this was error. The injury complained of by the plaintiff in error was caused by his own fault or negligence, and not by the fault or negligence of the company. So we think the court committed no error in sustaining the demurrer in this case.

Judgment affirmed.

BARNETT v. EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO.

Supreme Court, Georgia, November, 1891.

[Reported in 87 Ga. 766.]

NEGLIGENCE OF PLAINTIFF IN GETTING OFF MOVING TRAIN—

NO CAUSE OF ACTION.—A declaration alleging that the conductor of a passenger train agreed with plaintiff to stop the train for him to get off at a point where there was no regular station, but at which defendant's road crossed another railroad at grade, that plaintiff paid his fare to this point, and that on reaching the same the train only slowed up and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured, does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk, if the train was moving so rapidly as to make leaving it unsafe, or, if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off.

FROM Floyd Superior Court. The facts appear in the syllabus by the court.

DEAN & SMITH, for plaintiff.

A. O. BACON, DORSEY & HOWELLS, and W. T. TURNBULL, for defendant.

SYLLABUS BY THE COURT.—A declaration alleging that the

conductor of a passenger train agreed with plaintiff to stop the train for him to get off at a point where there was no regular station, but at which defendant's road crossed another railroad at grade, that plaintiff paid his fare to this point, and that on reaching the same the train only slowed up and did not stop, so that plaintiff, "in order to keep from being carried beyond his destination, was compelled to get from the moving train," and in so doing was seriously injured, does not set forth a cause of action, it appearing from these allegations that plaintiff's injury was caused by his own voluntary act in taking a dangerous risk, if the train was moving so rapidly as to make leaving it unsafe, or if not, that the injury must have resulted from a mere accident, or from plaintiff's own carelessness in getting off.

Where an amendment to a declaration is offered and disallowed by the court, it does not constitute a part of the record; and in order to have this court review the ruling of the court below in rejecting such offered amendment, it should be set out in the bill of exceptions or annexed to the same as an exhibit, properly authenticated. *Sibley v. Mutual Reserve Fund Life Assoc.*, decided this term (87 Ga. 738).

Judgment affirmed.

MASTERSON v. MACON CITY & SUBURBAN STREET RAILROAD CO.

Supreme Court, Georgia, February, 1892.

[Reported in 88 Ga. 436.]

GROSS NEGLIGENCE TO JUMP FROM STREET RAILROAD CAR GOING RAPIDLY—CITY ORDINANCE RESTRICTING SPEED NO EXCUSE.—It is gross negligence in a passenger on a street railway to jump from the car when it is going at a speed of twenty miles an hour, whether he knows or does not know that the car is going so fast. That the city ordinance restricted the speed of the car to seven miles an hour would make no difference.

SUGGESTION OF ANOTHER PASSENGER TO JUMP, MADE IN PRESENCE OF CONDUCTOR, WILL NOT JUSTIFY THE ACT.—The presence of the conductor, and his silence on hearing another passenger tell the plaintiff that the car was not going to stop and he had better get off, will not justify him in jumping from the car and causing his own injury.

FROM Bibb Superior Court. The facts are stated in the syllabus by the court.

R. W. PATTERSON, for plaintiff.

ESTES & ESTES, for defendant.

SYLLABUS BY THE COURT.—The action by Masterson against the street railroad company for personal injuries was dismissed on general demurrer, and the plaintiff excepted. His declaration contains the following allegations: On September 8, 1890, he was a passenger on said street railway, having paid his fare for transportation upon an electric car thereon from Vineville to such point in Macon as he might desire to quit the car. It is the rule and custom pertaining on the electric cars run upon said railway to stop at all street crossings, whether the conductor is notified to stop or not, and to stop at other points when requested so to do by passengers. The car on which he rode had a conductor, who was placed in charge of it and of the passengers by said corporation for the purpose of stopping the car for the exit of passengers, and for seeing that they were provided with a safe and comfortable method of exit. Plaintiff entered the car in company with others, who, like himself, desired to get off at a certain named street crossing, and one or two of this party notified the conductor, in the presence and at the request of plaintiff, that he and others of the party desired to get off at that point, and asked him to stop there, which notice was given the conductor shortly before the car reached said point, and in abundance of time to stop the car thereat. The conductor did not stop the car, but proceeded past said crossing. Plaintiff and others of the party with him, and the conductor, were all standing on the rear platform of the car. When it became evident that the conductor would not stop, one of the party, in the presence and hearing of the conductor, standing immediately by him, said to the plaintiff, who was nearest the place of exit from the car, "He is not going to stop; you had better just get off." The conductor made no objection or demurrer thereat. This was between eleven and twelve o'clock at night, and plaintiff had no method of ascertaining the speed at which the car was running, as it ran very smoothly over the track, and the surrounding darkness did not allow him, by a comparison with passing objects, to judge of the rate of speed; wherefore, in the utmost good faith and without negligence, exercising all the

caution he could, under what he believed to be the instructions of the conductor, who had heard him told to jump off and had not warned him of any danger, he jumped from the car, which, in fact, was going at a rate of speed amounting to twenty miles an hour. He was hurled violently to the ground and badly injured. It was the published rule and general custom of the street railroad company to stop at all street crossings, or to slow up to such a rate of speed as to render it safe for passengers to get off at such crossings. The contract and agreement and ordinance by which the company was allowed to run its cars through the streets of Macon was, that they should never exceed a speed of seven miles an hour. The plaintiff was young (twenty-seven years) and active, and could have jumped without injury to himself from a car going at that rate of speed. He knew of this regulation and of the custom of the company not to run its cars faster than seven miles an hour, and did not know or suspect that said car was running even as fast as that, but believed that it was going slowly, as it was at a regular crossing and stopping place; and when the remark was made, telling him to jump, he looked at the conductor, who was standing by him and heard the remark, and, receiving no intimation from him of the danger, he jumped off, using all reasonable and ordinary care to prevent injury to himself.

THE ATLANTA STREET RAILROAD COMPANY v. JACOBS. (1)

Supreme Court, Georgia, November, 1891.

[Reported in 88 Ga. 648.]

DUTY OF STREET RAILROAD COMPANY TO ALLOW PASSENGER REASONABLE TIME TO ALIGHT IN SAFETY.—Where the evidence of the plaintiff was that the driver of the street car stopped long enough to let her get to the rear platform and get down upon the step, but as she was about to step to the ground and before he had stopped long enough for her to get off, he started the car and she fell and was injured, a charge that the duty of exercising extraordinary care embraces the duty of allowing a passenger reasonable time to alight in safety, when the car at the passenger's instance stops for that purpose, is not error.

1. Cited in *Met. R.R. Co. v. Johnson*, 90 Ga. 500, 508.

LOSS OF CAPACITY TO LABOR DESCRIBED AS PAIN AND SUFFERING NOT ERROR IN CHARGE.—It is not error to describe as pain and suffering a loss of capacity to labor occasioned by a physical injury, nor is it error to call attention to it separately after instructing the jury touching other pain and suffering.

FROM the City Court of Atlanta.

Mrs. Jacobs sued for damages from personal injuries, alleging that she had a separate estate. The material allegations of her declaration appear in the opinion.

Before the trial defendant moved to dismiss the case because plaintiff's husband was not joined in the suit, it appearing from the declaration that she was a married woman. This motion was overruled, and this ruling is one of the errors assigned. The jury found for plaintiff \$3,000. Defendant's motion for a new trial was overruled, and it excepted.

The evidence for plaintiff was to this effect: She was quite stout, weighing 165 or 170 pounds. She had twelve children, ten of them at home. Her oldest child was 32, and her oldest child at home was 28. Otherwise her own age did not appear. Before she was hurt she had been accustomed to doing most of the sewing for the family, using a sewing-machine, and did all of the cooking; since she was hurt she has had to employ a servant, not being able to do the cooking, and she cannot use a sewing-machine. Her husband is living, and there are three children living with them over twenty years of age. She boarded a car of defendant, paid her fare, and when she got to the place at which she wished to stop, rang the bell. The driver stopped long enough to let her get to the rear platform and get down upon the step, but as she was about to step to the ground, and before he had stopped long enough for her to get off, he started the car and she fell. Both her knees were hurt; her right knee has never got well, and probably never will. She suffered much, and still suffers from the injury. She can get about in the house by holding to the walls and chairs, but cannot get around in the yard without a crutch, etc. The evidence for defendant was, that when plaintiff rang the bell the driver stopped the car, and the plaintiff went out the rear door and fell; and that the car was not started nor moved at all until the driver went to her and helped her up.

In addition to the grounds that the verdict was contrary to

law, evidence, etc., the motion for a new trial alleges that the verdict was grossly excessive, and assigns error on the following parts of the charge of the court:

"This duty of exercising extraordinary care embraces the duty of allowing the passenger reasonable time to alight in safety when the car, at the passenger's instance, stops for that purpose." Error, because it imposes upon defendant a greater duty than that imposed by law, the utmost duty imposed by law being, that a reasonably safe place be provided for alighting, and a reasonable time be allowed in which to alight; and after fully performing these duties, the defendant was discharged, though the passenger failed to alight in safety.

"And in this case, if you believe from the evidence that the plaintiff was a passenger of the defendant, and that she signaled the driver to stop, that she might get off, and the car did stop for that purpose, and that she went on the platform and upon the bottom step, and was in the act of stepping therefrom to the ground, the car being stationary, and that she was, by the starting of said car before she had completely left it, thrown upon the ground and injured, the law presumes in the first instance that her injuries were the result of defendant's negligence." Error, because the presumption of law was simply that defendant was negligent, and after this presumption arose, the burden of proof, as to her injuries, was still upon the plaintiff; the presumption required rebutting proof upon the part of defendant as to the manner of the accident, and in no way extended to its results.

"A physical injury which destroys or impairs the power of a human being to labor is an actionable injury, and this is true though the person injured should be a married woman. A physical injury which impairs the capacity of a married woman to labor is classified by the law with pain and suffering. It is not to be measured by pecuniary earnings, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him, but the wife herself has such an interest in her working capacity as that she can recover something, in a proper case, for its impairment, and what she is allowed ought to be more or less according to the nature of the injury and the length of time during which the pain and deprivation is likely to continue. Under such circumstances there is no known rule of law by which

witnesses can give you in dollars and cents the amount of injury, but this is left, as I have remarked, to the enlightened conscience of the impartial jurors." Error, because in this case the plaintiff could only recover for pain, and in the preceding section the court charged fully upon this branch of the case. The destruction of the power of labor was not a separate item for which a recovery could be had; it was but one element of pain. By giving this section in charge the court, in effect, allowed a double recovery for the same thing, and the jury promptly took advantage of the opportunity, as shown by the amount of the verdict. The impairing of plaintiff's working capacity was not an element of damages. If proper at all, it should have been submitted under the head of pain.

JOHN L. HOPKINS & SON, for plaintiff in error.

HOKE & BURTON SMITH and W. H. RHETT, for defendant in error.

Bleckley, Ch. J.—1. The contention of the learned counsel for the railroad company is, that it was error to submit the impairment of the power of a married woman to labor as a distinct element of damage, and allow her to recover for it. He insists that this damage was not sued for, and that in another part of the charge of the court the entire subject of pain was dealt with; hence the jury were allowed to give for impairment of her power to labor what they pleased, even though it were greatly more than her husband would be entitled to recover were he the plaintiff in the action. It is true that it is not expressly alleged in the declaration that the capacity of Mrs. Jacobs, the plaintiff in the court below, to labor, was impaired, but a definite injury to her person is alleged and described which incapacitated her to walk without the aid of crutches. An injury which disables one from walking without crutches necessarily impairs to some extent ability to labor. It follows that such impairment is embraced by necessary implication in what the declaration alleges. The injury sued for being one which incapacitated the plaintiff to walk without crutches, and consequently one which impaired her ability to labor, compensation for this impairment of her physical perfection was a part of the redress for which the action was brought and to which the plaintiff, when she verified by evidence the case set out in her declaration, was entitled. According to the declaration, the

plaintiff "was thrown violently to the ground, striking her knees on the stone pavement of the street; the fall caused great pain and suffering and injury; she will always suffer from said injury, and her capacity for enjoyment has been greatly lessened; her knees were very much bruised, and the bones much injured; she has been compelled ever since to remain under the treatment of surgeons; she has been confined to her bed six weeks, and has been unable to walk at all since the occurrence, except on crutches; the injury to her knee is permanent, and she will be compelled to use crutches all her life; she has been put to great expense and suffering on account of said injuries, and has been entirely unable to care for herself." She claims damages in the sum of \$15,000.

2. Grant that the entire subject of pain was dealt with in a previous part of the charge of the court, the jury could not have understood from the instructions added on the subject of impaired power to labor that they were to give double damages for pain and suffering. On the contrary, they must have understood that the general instructions related to pain other than that discussed in the special instruction. It seems to us that the loss or material impairment of any power or faculty is matter for compensation irrespective of any fruits, pecuniary or otherwise, which the exercise of the power or faculty might produce; and irrespective, also, of any conscious pain or suffering which the loss or impairment might occasion. Every person is entitled to retain and enjoy each and every power of body and mind with which he or she has been endowed, and no one, without being answerable in damages, can wrongfully deprive another by a physical injury of any such power or faculty, or materially impair the same. That such deprivation or impairment can be classed with pain and suffering was ruled by this court in *Powell v. Railroad Co.*, 77 Ga. 200; and inasmuch as enforced idleness or diminished efficiency in offices of labor is calculated to give rise to mental distress, it is not error to describe the thing by its effects and call it pain and suffering. But it need not be so called necessarily, and consequently it was not misleading for the court to treat of it separately as a subject-matter for compensation in damages, although the plaintiff was a married woman. Touching this element of her case, the measure of damages would be neither more nor less than that which the law rec-

ognizes for pain and suffering. There is no standard but the enlightened conscience of impartial jurors.

The other points made by the record were not argued by counsel; and if they embrace any error, we have been unable to discover it.

Judgment affirmed.

HOUSTON V. THE GATE CITY STREET RAILROAD CO.

Supreme Court, Georgia, May, 1892.

[Reported in 89 Ga. 272.]

EXCLUSION OF EVIDENCE OF SIMILAR INSTANCES ON PREVIOUS OCCASIONS, WHEN ERROR.—Whether a person who attended a child in boarding a street car on a particular occasion, for the purpose of placing upon the car small packages, which the child was to have in charge, had frequently before done the same thing, at the same place, when the same driver of the car was on duty, is admissible evidence as tending to show that the person on this particular occasion intended to get off after depositing the packages, as she had done on the previous occasions, and did not intend to remain on board, so as to justify the driver in starting the car suddenly, while she was engaged in getting off; it being the duty of the driver (there being no conductor) to take notice of all persons entering the car, his knowledge that the plaintiff did enter it in this instance might be inferred; and if he knew that she had withdrawn from the car and alighted in numerous previous instances under like circumstances, it could be inferred that he knew or ought to have known that such was her intention on the occasion in question.

The court erred in excluding evidence of the previous instances, and consequently in granting a nonsuit.

FROM the City Court of Atlanta. The facts appear in the syllabus by the court.

WESTMORELAND & AUSTIN, for plaintiffs.

JOHN L. HOPKINS & SON, for defendant.

SYLLABUS BY THE COURT.—An action was brought by Lucretia Houston and her husband against the street railroad company for damages arising from personal injuries to her. A nonsuit was granted, and upon this ruling is the main assignment of error. Exceptions were taken also to the rejection of testimony, and these will be noted further on.

The declaration alleged that, about six o'clock in the afternoon of March 29, 1890, Lucretia Houston was on the defendant's car seating a small boy with a tray of provisions to be carried by the car, which it was her custom and so known to be by the defendant's agents and servants; that the driver of the car stopped to allow her to put the boy and tray on the car and put his fare in the box, which was her custom and which custom was known to defendant's agents and servants; and that, while she was in the act of leaving the car and before she had put her foot on the street, the driver, though knowing that she was in the act of leaving the car and that it was her purpose when she got on to deposit the boy and tray and then get off, instead of giving her time to leave the car, suddenly and violently started it without warning or notice to her, and threw her into the street, whereby she was seriously injured. The ground on which the nonsuit was granted was, that there was no evidence that the driver in this instance knew that she intended to get off before the car resumed its journey, nor that he knew she was engaged in an attempt to get off when it did resume it.

In the testimony of Lucretia Houston the following appears: "I will be 47 years old on the 4th day of October, 1891. On the 29th day of March, 1890, I was cooking for Lizzie Alexander on Wheat street. She was running a restaurant, and furnished meals to four young men. . . . The meals were sent on Saturday nights. About 6 o'clock in the evening on the 29th of March, 1890, I waved down the driver of a street car in front of the restaurant, for the purpose of putting the buckets that contained the meals and a little boy . . . about eleven years of age, on the car. The meals were to be carried . . . by the little boy. I had put these meals and the little boy on the car once or twice before. I had put him on mighty nigh every Saturday evening. The Saturday evenings that I did not put him on Lizzie Alexander or Henrietta Perry did it. I went out for that purpose. I knew the driver of that street car. He was boarding at the restaurant at the time, and I had put the boy and the buckets on that car exactly like I did that Saturday night. I was not going to go myself, but was going to put the boy on the car and get off, which was my usual custom, and the driver knew it. As I was just leaving and was about to step down, the driver struck the mules and they moved

on. I was getting off the back platform, the way I went in at with the victuals. I waved him down as he passed by me, and when he stopped I got on at the back end. He stopped the car still before I got on. When I got on I had the bucket in my hand, nothing else. I put the bucket and the boy on the car, the boy going in ahead of me. I set the bucket down in the car and turned to go out. As I went to make the step down I was thrown off and injured. . . . I put the boy on the car with the provisions to send it . . . like I always do on Saturday nights, and when I turned round to come out the driver struck the mules and threwed me. . . . I had my hand on the back dashboard and was putting this foot to the ground, and just as this foot hit the ground the driver struck the mules, and that throwed me off kind of sidewise like. The right foot was on the step. . . . When I went into the car I had nothing on my head. Mr. Christian was driving the car. He saw me and I saw him. . . . He was driving it when I first went there (five or six months previously), and I had been sending meals . . . ever since I had been at the restaurant. Sent them only every Saturday night. The meals were generally put on Mr. Christian's car, No. 5, nigh every time. . . . I went to put the meals on the car with the buckets, and just as I went inside and made the boy sit down, and as I went to go out and was in the act of making the step down, and put this foot to the ground, the driver struck the mules and throwed me off. I had two buckets and a coffee-pot. I put them down just inside the door, on the right-hand side of the door, the side that the restaurant was on. The boy paid his fare himself. I saw him do so before I set the buckets down. When he came back to where the buckets were I was standing waiting at the door, so I could give him the coffee-pot, and when he sat down I handed it to him, and turned round to go out. I did not sit down. There was only one step from the top to the ground. As I left the car my right hand was on the iron, the dashboard, and my left was down by my side. I was just fixing to make the step on the ground when he struck the mules. The car just passed the door, and I signaled to him and he stopped, and then I got on. Mr. Christian was standing on the front part of the car as I got in the back part. The entire car was between us. I heard him when he struck the mules; did not hear him say anything to them. Did not ring the bell; did

not say anything to him at all to stop, because I knowed he knowed I was there. . . . The car stood there long enough for the boy to go and pay his fare and come back. . . . On every occasion I sent the meals on Mr. Christian's car. I selected his car because we knowed him, generally, better than the rest, and he has been to his meals there most. . . . The car was a shut-up car, made of wood and iron, door at each end, glass windows in each door; both sides had glass windows. Could see through the car. I could see the driver from the back platform, and he could see from the front platform to the back platform. Could see through from one platform to the other."

In the testimony of the little boy appear these statements: "When Lucretia stepped on the street car she put the bucket inside the car, and when she turned round to get off, that man struck the mules and made them get up and threw her off. . . . I was sitting down inside the car when he struck the mules. I was not in there no time. When I went in I sat down. I put in the fare after I sat down, in the box next to the driver. . . . I had been going with the suppers. . . . on Saturday nights almost all the year, and I generally got on Mr. Christian's car. It looked like every time when I would go to catch a car I would catch his car. Mrs. Houston generally put me on the car. She would just take me by the hand and lift me on the car, and she would put the buckets and coffee-pots on. On the night the man struck the mules she did not stay on the car two minutes. She usually did not stay there no time. . . . The car did not stop after she was thrown off. The car was going fast when she waved it down. When the driver hit the mules they started off fast and went to trotting. . . . The street was lighted. . . . It was an electric light. . . . She put me on the car first; helped me by my hand. She reached her hand in and set the bucket and coffee-pot down, and she turned to get off, and Mr. Christian struck the mules and made them get up and threw her off. She had the bucket and coffee-pot both in her left hand. She was standing on the platform. She reached her left hand round and put them on the floor. When I first went in I sat down and jumped up and put the nickel in the box. . . . I did not sit there a minute before I put the nickel in. . . ."

Lizzie Alexander testified: "On this Saturday night a man by

the name of Christian was driving the car. She waved him down and stopped him and put the boy on, and he paid his fare. She had the buckets in her hand. I then turned round from the door and went back into the kitchen after the car stopped, and she put the boy on, and she did not come right back, and I needed her, and I went to the door to see what was the matter, and I went to the door and she was leaning against the post, and I asked, "What is the matter?" She could not speak, and I said, "What is the matter?" and she said, "Don't take hold of my arm; my arm is hurt." On objection this last statement was excluded; and the court also refused to allow Lucretia Houston to testify what she stated to Lizzie Alexander just after Lizzie had assisted her into the restaurant and asked how she was hurt. The plaintiffs insist that each of these statements was competent as part of the *res gestæ*.

The court refused to allow Lizzie Alexander to testify what length of time Christian had been driving defendant's car. The plaintiffs contend that the testimony was competent as a fact or circumstance tending to show knowledge on the part of defendant's servant that Lucretia Houston went on his car for a special purpose, and intended to get off before he started the car. A like assignment of error is made upon the exclusion of the testimony of the little boy, that Lucretia Houston "usually got on and off the hind end" of the car. For the same reason the plaintiffs except to the exclusion of the testimony of Lucretia Houston, given on cross-examination, that the reason she did not ring the bell or speak to the driver to stop was, that she knew he knew she was on the car.

THE ATLANTA & WEST POINT RAILROAD CO. v. DICKERSON. (1)

Supreme Court, Georgia, June, 1892.

[Reported in 89 Ga. 455.]

COMPANY NOT LIABLE FOR INJURY TO PASSENGER ALIGHTING FROM MOVING TRAIN LEAVING STATION.—In the absence of a custom to give signals for passengers to get off, a railroad company is not bound to give any signal for such purpose, after having stopped

1. Cited in *Poole v. Ga. R.R. Co.*, 92 Ga. 321.

its train and kept it standing at the station a sufficient time to allow passengers to alight by the exercise of ordinary and reasonable diligence on their part. If, after the allowance of such time, a train moves off without giving any signal, and a passenger is then in the act of alighting, none of the employees connected with the train knowing of his delay or of his exposed position, and he is injured in consequence of the movement of the train, the company is not liable for the consequences.

LEAPING FROM MOVING TRAIN EVEN WHEN GIVEN INSUFFICIENT TIME TO ALIGHT AT STATION IS NEGLIGENCE.

—If a passenger voluntarily leaps from the train whilst it is in motion and is injured thereby, he cannot, as a general rule, recover of the company, although the train may not have been stopped at the station long enough to afford reasonable opportunity to get off in the usual way.

FROM the City Court of Newnan. The facts appear in the syllabus by the court.

P. H. BREWSTER, for plaintiff in error.

BIGLEY, REED & BERRY, L. N. MERCIER and W. A. TURNER, for defendant in error.

SYLLABUS BY THE COURT.—The plaintiff sued the railroad company for damages, alleging that he was a passenger on its train to a station on its road, and that when the train arrived at that station, he being in the act of getting off the car and being still on the platform, the train was suddenly started and put in motion with a jerk, without giving him sufficient time to safely get off, and without giving the usual signal preparatory to starting, whereby he was thrown to the ground and seriously injured without fault on his part. The evidence was conflicting. There was testimony for the plaintiff in support of his allegations; while the testimony for the defendant tended to show that the train was stopped long enough for all passengers to get off who wished to do so; that the usual signal for starting was given by two short blows of the whistle or by ringing the bell, and that the plaintiff really jumped from the door in the side of the baggage car, when the train was moving off, and shortly afterwards stated that he did do so for fear the train would carry him on. There was a verdict for the plaintiff; a motion by the defendant for a new trial was overruled, and it excepted. The motion contained the grounds that the verdict was contrary to law and evidence, and several grounds which alleged that the court erred in the following instructions in the charge to the jury:

"If the evidence shows that the plaintiff was a passenger, having paid his fare, and was injured by the failure of the agents of defendant to exercise extraordinary diligence, then plaintiff would be entitled to recover. Did the cars stop reasonably long enough for the plaintiff using ordinary diligence to alight, and was the proper signal for starting given before starting? If so, plaintiff cannot recover. If you find from the evidence that the cars stopped long enough for plaintiff, under the circumstances surrounding him, by using ordinary and reasonable diligence, to get off, and you further find that the proper signals to start were not given before starting said train, and you find from the evidence that the failure to give proper signals did not contribute to the injury, then the plaintiff cannot recover. If proper signals were not blown before starting, and by reason of this negligence plaintiff was hurt, he can recover. Defendant further says that plaintiff did not get off cars at the door and platform, the usual and only place or means provided for entering and leaving said cars, but jumped out of the baggage car door. Well, gentlemen, see how this is. If you find from the evidence that the contention of the defendant as to this is true, then, gentlemen, see whether a man of ordinary prudence and care would have thus jumped from the car under the circumstances then surrounding him. The law requires of plaintiff to use ordinary care and prudence in alighting, and if he failed to do this, he cannot recover if he was injured thereby. The defendant contends that the plaintiff, fearing that he would be carried on, jumped off of the cars while moving. What do the facts show as to this? If he jumped off, was he in the use of ordinary diligence to do this? If he did not use ordinary diligence, he cannot recover. If plaintiff used ordinary diligence to alight and in fact had not alighted, and while he was in the act of getting off the cars started without giving signal, and by reason thereof he was thrown from the cars and injured, he is entitled to recover."

CENTRAL RAILROAD CO. v. PHILLIPS.

Supreme Court, Georgia, April, 1893.

[Reported in 91 Ga. 526.]

DESCRIBING BOY FIFTEEN YEARS OLD, WHO JUMPED FROM A MOVING TRAIN, AS AN INFANT OF TENDER YEARS, IN JUDGE'S CHARGE, IS GROUND FOR REVERSAL.—A boy fifteen years of age went upon a train to speak to a passenger, and while he was upon the train it started, and before he could alight it had attained great speed, and having only a little money to pay his fare, which the conductor took, the conductor threatened to arrest him and lock him up, which so frightened the boy that he jumped from the train and was injured. In an action for the injuries the judge in his charge treated the boy as an infant of "tender years." *Held*, that in the absence of any evidence of want of ordinary capacity, this was error, and a judgment on a verdict for plaintiff was reversed.

BOY OVER FOURTEEN MAY BE GUILTY OF NEGLIGENCE.—

As by the law of this State a boy over fourteen years of age is presumably capable of committing crime, he is presumptively chargeable with diligence for his own safety against palpable and manifest peril.

IT IS PROPER TO SEND THE CONDUCTOR OF THE TRAIN OUT OF THE COURT ROOM DURING THE EXAMINATION OF OTHER WITNESSES.—Plaintiff's witnesses having been sent out of the court room during the examination, it was no abuse of discretion in subjecting the conductor to the rule applicable to the sequestration of witnesses.

FROM Bibb Superior Court. The facts appear in the opinion. R. F. LYON, for plaintiff in error.

DESSAU & BARTLETT, for defendant in error.

Simmons, J.—The plaintiff, a boy fifteen years of age, jumped from a railway train which was running at the rate of twenty-five miles an hour, and broke his leg. He sued the railroad company, alleging in his declaration that he went on the train before it started, for the purpose of getting some keys from his sister, who was a passenger; that the train started while he was on it, and before he could alight its speed became so great that he could not get out without endangering his life or person; that when the conductor demanded his fare he explained these facts, and that he did not have enough money to pay his fare to the next station, but his sister offered the conductor twenty cents, which the conductor took; that the conductor then threatened to

take him to Savannah and put him in jail, and summoned the brakesman and another member of the train's crew for the ostensible purpose of arresting him and locking him up and carrying him to Savannah; that the conductor by his threats and acts so frightened and alarmed him, that, believing and thinking the conductor would carry his threats into execution, he broke away from the brakesman and the other member of the crew, and in order to keep from being locked up and carried to Savannah and put in jail, he jumped from the train while it was in rapid motion and was injured, etc. He recovered a verdict for \$1,000, and the defendant made a motion for a new trial, which was overruled and it excepted.

1. It appears from the motion for a new trial, that after all the witnesses had taken the oath, and the witnesses for the plaintiff, in accordance with the request of counsel for the defendant, had been sent out of the court-room so as not to be present during the examination, the court, at the instance of counsel for the plaintiff, sent out the defendant's witnesses also. Counsel for the defendant requested the court to allow one of his witnesses to remain in the court-room, as this witness was the conductor and stood in the place of the defendant in the case, and was the only representative of the defendant who was acquainted with the facts as they occurred, and counsel desired his assistance in the examination of witnesses for the defendant as well as for the plaintiff. The refusal of this application is alleged to be error. Where there is an order for the separation of witnesses, exceptions therefrom as to witnesses not parties to the case are discretionary with the court. *City Bank of Macon v. Kent*, 57 Ga. 285, 291. Under the facts of this case, the discretion of the court was not abused in refusing to make the exception requested.

2. We think the court erred in its charge to the jury, in treating the plaintiff as an infant of "tender years," in respect to the care and diligence for his own safety to be required of him. While the jury could consider his youth in determining whether the alleged threats and menacing acts of the defendant's agents and servants were calculated to and did produce on his part such fear and excitement as to render him in some degree irresponsible for his own acts and excuse his conduct in jumping from the train, and while the conduct of a boy of his age, under such circum-

stances, is not to be judged by the same standard as that of a man, he is nevertheless held to a higher degree of responsibility than one whom the law regards as an infant of "tender years." A young person of the age of this plaintiff is presumed to be capable of realizing danger and of exercising the necessary forethought and caution to avoid it, and is presumptively chargeable with diligence for his own safety, where the peril is palpable and manifest, as it was in the present instance. By analogy to the provisions of the penal code touching capacity for crime (§ 4294), this presumption attaches at the age of fourteen years. *Rhodes v. Railroad Co.*, 84 Ga. 322. This is the rule adopted by other courts of high authority. See *Nagle v. Railroad Co.*, 88 Penn. St. 35; S. C., 32 Am. Rep. 413. In *Tucker v. Railroad Co.*, 124 N. Y. 308, the principle of the decision is the same, though the age is held to be twelve years, that being the age to which the penal code of New York limits the presumption of incapacity for crime. The court say: "While this statute does not undertake to prescribe, and does not necessarily affect the rule to be applied in civil actions, it suggests as asserted in the *Nagle* case (*supra*) an age to which the courts can with safety limit the presumption of incapacity on the part of an infant to appreciate the perils incident to crossing railroad tracks. This presumption may, in a proper case, be so far overborne by evidence as to present a question for the jury, and then the age of the injured party may doubtless be considered by the jury in connection with the facts indicating a lack of comprehension of a dangerous situation; but in the absence of evidence tending to show that an injured infant twelve years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*."

In the present case there was no evidence of want of ordinary capacity on the part of the boy. Indeed, the proof showed that for some length of time before the injury, he had been at work as a farm hand, plowing, cutting cross-ties, etc., and that he was a good hand and did the work of a man.

What is said in the decision quoted from, to the effect that where the presumption of capacity exists the minor is chargeable with the same measure of caution as an adult, of course does not apply where he acts under the pressure of intimidation and incurs

the risk in attempting to escape a threatened and impending injury of another kind, as is claimed to have been the case here. In such case he is to be treated, neither as an adult nor as a child of tender years, but as a young person whose mental and physical immaturity may be taken into consideration and who is chargeable with such diligence as, under the circumstances, might fairly be expected of the class and condition to which he belongs. The charge of the court being inaccurate and misleading on this subject, we think a new trial should be granted.

3. There was no error in admitting evidence, and none in the charge of the court, except upon the question ruled on in the preceding division of this opinion.

Judgment reversed.

THE AUGUSTA RAILROAD CO. v. GLOVER. (1)

Supreme Court, Georgia, June, 1893.

[Reported in 92 Ga. 132.]

GATES ON ELECTRIC CARS FOR PROTECTION OF PASSENGERS

IN ALIGHTING.—An electric railway company which has provided its cars with gates to prevent passengers from alighting on the side next to a parallel track, cannot defend itself against the charge of negligence in not keeping one of the gates closed, by the evidence of its president "as to observations he had made in reference to electric street car lines, cable car lines, and other street car lines operating on double tracks, that he had made recently in various cities of the United States, in reference to the use of gates on the cars, and to show that gates are not used."

QUESTION OF CLOSING GATES ON ELECTRIC CARS IS FOR

THE JURY.—Although there may be no negligence whatever in the failure of an electric street railway company to have gates to the platforms of its cars, for the purpose of guarding against accidents to passengers by preventing them from leaving the cars on the side next to a parallel track of the same company, in the street, yet, when a particular company has such gates to the platform of its cars, not to keep them closed may or may not be negligence in the given instance, and this is a question of fact for the jury.

INEXPERIENCE OF PASSENGER ON ELECTRIC CAR IS ADMISSIBLE IN EVIDENCE.—The fact that the passenger killed had never

1. Cited in *A. & C. etc. R'y Co. v. Gravitt*, 93 Ga. 369, 372. Distinguished in *Mayor, etc. v. Sikes*, 94 Ga. 30, 36, on the question of writing off a part of damages given by verdict.

before ridden upon an electric car, was admissible in evidence for the purpose, at least, of illustrating the cause of his failure to alight from the car in safety.

PASSENGER SHOULD BE GIVEN REASONABLE TIME TO ALIGHT.

—Although it is the duty of a street car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose, yet if the place be safe for a passenger to get off whilst the car is at rest, the company is not responsible for any peril which the passenger incurs, without its fault, from attempting to alight after the stoppage has terminated and the car has been put in motion, provided a reasonable time for alighting was allowed whilst the car was at rest, and the conductor did not know that the particular passenger intended to get off at that place and did not see him attempting to get off in time to warn or prevent him from so doing whilst the car was in motion.

PASSENGER ALIGHTING FROM CAR WHEN IT STOPS BECAUSE OF AN OBSTRUCTION.

—When a car stops because of an obstruction on the track, and not to afford any passenger an opportunity for getting off, the company is not responsible for the safety of the place as one for getting off, whether the car, at the time the passenger undertakes to do so, be in motion or at rest, the conductor not seeing the passenger or being aware of his purpose at the time the attempt to get off is made.

ACTION BY MOTHER FOR DEATH OF SON NOT BARRED BY ACTION BY FATHER.

—It is no bar to a suit by the mother for the homicide of her minor son, that the father has a pending suit in which he claims damage for the loss of the son's services up to the time the latter would have arrived at his majority.

FROM the City Court of Richmond County.

On January 13, 1891, Mrs. Glover sued the railway company for the killing of her son, John C. Glover, who was alleged to have been fifteen years and five months old. The declaration alleged, that he was single, and had no child or children; that she was dependent on him, and he contributed to her support; that he boarded one of defendant's street cars propelled by electricity in Augusta, for the purpose of going to the Georgia Railroad depot, took his seat and paid his fare; that when the car reached a certain point about opposite the Union Depot, it came to a stop and he got off the car from the rear platform, near to the parallel street railroad track of defendant, at which moment another of defendant's cars, running on the parallel track in an opposite direction to that of the car from which he had just dismounted, ran over him, killing him; that he was not familiar with the method in which the cars were run and operated; that he resided

in the country and had never before ridden on said electric cars; that the approach of the car which ran over him was wholly unexpected and unseen by him until too late to get out of the way; that it was the duty of defendant's agents in charge of the car on which he had ridden to the depot to have had closed the platform gate next to the parallel track on the rear end of the car, and to have cautioned and seen that he did not leave the car from that side, which duties they negligently and carelessly failed to perform; that it was also the duty of defendant's agents in charge of the car which ran over him to have slowed up as it approached the point where it was to pass the other car, which duty was wholly disregarded, the car being actually run at the time at the rate of twelve miles per hour, a rate not only positively prohibited by the city ordinances, but which, in the absence of such prohibition, would at that locality have been an act of gross carelessness; that the motorman in charge of the car that ran over her son, at the moment or just before, was negligently engaged in a conversation with the conductor, instead of being on the lookout ahead of his car, as was his duty.

1. The defendant demurred to the declaration on the grounds that it set forth no legal cause of action, and for failure to allege certain things as to which see the first division of the opinion. The demurrer was overruled.

2, 3. On the overruling of defendant's motion to strike from the declaration certain words as irrelevant and illegal, and on the striking of a special plea as to plaintiff's non-residence, the opinion fully states the facts.

4. Contemporaneously with the filing of the mother's suit, a suit was filed by the father for the loss of the son's services up to majority, alleging the same acts of negligence as set forth in the mother's declaration. Defendant filed a plea in abatement, alleging that the two suits were for the same cause of action, and were inconsistent, and praying that an election be required as to which of the two would be proceeded with. The father's suit was thereupon dismissed by his counsel, but was renewed after verdict for the plaintiff in the present case and pending defendant's motion for a new trial; and defendant filed an amendment to said motion, setting forth these facts, and alleging that they were proper to be considered in passing on the motion, because the

father could not be entitled to the services of the son and the proceeds of his labor, and the mother at the same time dependent thereon for her support, and the son contributing to her support within the meaning of the law.

5. Among the grounds of the motion for a new trial, error is assigned on the admission, over defendant's objection, of testimony that plaintiff's husband was over fifty years old and incapacitated to labor at times, and had been completely so for weeks at a time, and when he was not laid up he was not able to do as much work as other men, all on account of an old wound which now and then broke out on him. The objection was, that the testimony was irrelevant and illegal, and tended to prejudice the jury.

6. Testimony that plaintiff "received benefits from the services of this boy," and that she was "a dependent person," was received over objections. Defendant requested the court to charge as follows, and the refusal to do so is assigned as error: "If you find from the evidence that deceased was about 15 ½ years old; that he lived at home with his father and mother; that he had an older brother and some sisters, who also lived at home and worked on the farm, and they all helped their father in this work; that deceased worked on the farm with his father and sisters and older brother, as one of the family, without wages, when he could, and helped his father at other work when he could; and that the proceeds of his labor, both on the farm and elsewhere when he worked, went into the common lot, or was used by the father and mother, and thus contributed to the help and support of all the entire family, then I charge you that the mother, under the law, was not substantially dependent on him for a support, and you should find a verdict for the defendant. Where a mother is substantially dependent on a child for support, and that child materially contributes to her support, the child stands in the place of and represents the father or husband, so far as he substantially contributes, in whole or in part, to her support. If you find, in this case, that the father lived with his wife and family; that he was the head of such family, and did all he could to support the same; and that deceased only aided and helped as a son would naturally do, and the result of his labor went for the benefit of himself and his father and mother and other members of the family, then I charge you that, under the law, the plaintiff was

not substantially dependent on him, and you should find for the defendant."

7, 8. Assignments of error in admitting evidence, as to which see the opinion.

9. Error is assigned on the refusal of the court to give the following in charge, as requested: "If you find that it was not customary, at the date of the accident, for the gates of the cars, on the side next to the parallel track, to be closed except on Broad Street, and that they were closed on that street on account of the posts between the tracks, then you may consider this reason in passing on the alleged negligence of defendant, and if you are satisfied that it was not negligence to open them while off of Broad Street, you may relieve the defendant of any negligence charged on this account. If you believe from the evidence that the defendant was negligent in leaving open the gates of the car on the side next to the parallel track, and yet that deceased saw it was open, or by the exercise of ordinary care could have seen it, and after he saw that the gate was open he stepped off of the car while in motion and on the side of the parallel track, then you may consider this fact in determining as to whether deceased could have avoided the injury by the exercise of ordinary care; and if you believe he could, then plaintiff cannot recover, and you should find for defendant."

10, 11. Errors in the charge, as to which see the opinion.

12. Error in not stopping Judge Twiggs, who concluded argument for the plaintiff, and who, after stating that the jury knew it was not dangerous or negligent to get off the street cars while in motion, said: "Why, gentlemen of the jury, I do it myself every day. I live on the Hill, and when the cars get opposite my gate I just step off of the car. The cars do not stop, and I don't ask them to stop, and I step off when they are going pretty fast at that; and there is no more danger about it than there is in stepping on this floor." The court did not hear these remarks.

13. Error in the charge quoted in the thirteenth division of the opinion.

14. Other grounds of the motion are, that the court erred in not charging the following as requested: (a) "I charge you that if deceased could have seen the car approaching him and avoided it by the exercise of ordinary care, then the plaintiff cannot

recover." (b.) "I charge you that if you find from the evidence that deceased got on the car to go to the Union depot; that the car stopped at the usual place of stoppage to let passengers off at said depot; that it moved on and that deceased left said car at a point beyond the stopping place, and on the side next to the parallel tracks and while the car was in motion, then you may consider these facts in passing on the question as to whether deceased could have avoided the accident by the use of ordinary care, and if you find he could, then plaintiff cannot recover." (c) "If you believe from the evidence that deceased stepped from a moving car, and that there was space enough between the tracks for a person to stand, and that from the manner in which he got off of the car he was thrown upon the other track, and that the motorman and other agents of defendant exercised all ordinary and reasonable care and diligence to prevent the injury, then plaintiff cannot recover." (d) "If you believe from the evidence that deceased stepped off of the car while it was in motion, and that another car, coming in the opposite direction, was within a few feet of him, and that the motorman of that car did not see him, or could not in the exercise of extraordinary diligence see him until he stepped off, and if you further believe that just as soon as he did see him he did all that was possible to prevent the car running over him, then I charge you that you may consider these facts in reaching a conclusion as to whether the defendant exercised all ordinary and reasonable care and diligence after his danger became apparent, and if you find it did, then plaintiff cannot recover." (e) "If you find from the evidence that the time between the deceased stepping from the car and the injury was but a few seconds, you may consider this fact in determining if defendant used all ordinary and reasonable care and diligence in the time allowed and under the circumstances of the accident, and if you find it did, then plaintiff cannot recover, and you should find for defendant." (f) "If you find from the evidence that the deceased saw the parallel tracks of defendant's road, or could have seen them by the exercise of ordinary care, then I charge you that you may consider this fact in arriving at a conclusion as to whether deceased exercised ordinary care in getting off of the car of defendant on the side next to the parallel tracks of the road, and if you find he did not, and as a result of getting off on that side

was killed, and the defendant exercised all ordinary and reasonable care and diligence after his danger became known, then plaintiff cannot recover, and you should find for defendant." (g) "A railroad company is not an insurer against accidents, and if you believe that the death of Mr. Glover resulted from an accident in his losing his balance in stepping off of the car and so near to the passing car that he was run over by it, and that the man on the passing car exercised all ordinary and reasonable care and diligence, after he saw him step off, to prevent running over or striking him, then I charge you that plaintiff cannot recover." (h) "If you believe that deceased got off of the car while it was in motion, then I charge you that you may consider that fact as to whether he should not have looked out for himself for danger, and if you believe from the evidence that if he had looked he could have seen the car which ran over him approaching, but stepped off when the car was too near him to be stopped by the exercise of all ordinary and reasonable care and diligence upon the part of those operating it, then plaintiff cannot recover, and your verdict must be for the defendant." (i) "If you believe from the evidence that Mr. Glover voluntarily stepped from the car while in motion and got upon the ground, then the relation of passenger and carrier ceased, and Mr. Glover was from that time entitled only to the same care and diligence from the railroad that any other citizen upon the street had. That care was the exercise of all ordinary and reasonable care upon the part of the company, and not extraordinary care. Extraordinary care is only required as long as the relation of carrier and passenger exists." (j) "If you find from the evidence that the car in which Mr. Glover rode had posted in the car, where they could be seen, notices to passengers not to get off while the cars were in motion, or next to the parallel tracks, then you may consider this fact in passing upon the question as to whether deceased had notice of the way and side on which and the time at which he should have gotten off the car. The presumption is that these notices are seen and read."

15. The jury found for the plaintiff \$7,733.98. The motion for new trial alleged that such amount was grossly excessive, etc. After argument, but before any decision on the motion, plaintiff's counsel, without notice to opposing counsel, voluntarily wrote off \$905.02 from the verdict. Error is assigned, because the court

allowed this sum to be thus written off, it being alleged, that if the court was of the opinion that the verdict was excessive, the same should have been set aside and a new trial granted; that such practice is unfair and illegal, tending to the injury of defendant; and that the amount left after the writing off is still grossly excessive and unwarranted by the evidence.

J. S. & W. T. DAVIDSON, for plaintiff, in error.

TWIGGS & VERDERY, J. C. C. BLACK and J. T. PENDLETON, for defendant, in error.

Bleckley, Ch. J.—1. The material contents of the declaration are stated in the official report. A legal cause of action under the Act of 1887 was set forth. It was not necessary to allege that the deceased could not have seen the car approaching him in time to avoid coming in collision with it, or that he made any effort to avoid coming in collision with it. It was not necessary to allege that the point at which he left the car was the regular stopping place, or that the stopping of the car was for the purpose of taking on or letting off passengers. It was not necessary to allege that he gave any notice of his desire or intention to leave the car, or that defendant's servants had notice of such intention. It was not necessary to allege that the company had notice of his want of familiarity with the running and operation of electric cars, or anything as to his size or appearance. The plaintiff's right of action did not depend upon widowhood or living apart from her husband, and as she alleged dependence on this son, although he was only between fifteen and sixteen years of age, it was not necessary to allege in what way she was dependent on him, or that he had ever worked or earned money. The declaration imputes the homicide to the negligence of the company, and points out specifically in what respects the company was negligent. The plaintiff's right to sue and to recover for the negligent homicide of her son is sufficiently apparent on the face of the declaration. There was no error in overruling the demurrer.

2. The motion to strike from the declaration the words, "that the said John C. Glover was not familiar with the manner in which said cars of the defendant were run and operated; that he resided in the country, and had never before ridden on said electric cars," was properly denied, the motion to strike being made orally at the trial. If these words were objectionable as having no appro-

priate place in the declaration, the right mode of expelling them was by special demurrer, filed at the appearance term. It would be altogether impracticable for the court, when the trial is on hand, to entertain motions to purge the pleadings of superfluous and irrelevant matter, whether of form or of substance. The pleadings so far as possible should be settled before the trial term arrives, and this is the scheme of our law, except in so far as voluntary amendments are concerned. These, as a matter of right, may be made at any stage of the case.

3. The special plea to the effect that the plaintiff and her son were both residents of South Carolina, and that she has resided there ever since, presented no defense to the action. The statutory right is given by the Act of 1887 to all mothers, no matter where they reside, and without reference to the residence of the child whose homicide is the subject matter of the action. Whenever a Georgia mother can recover any other mother can do so under like circumstances. The act is general in its terms, and has no hint of any discrimination in favor of residents or against non-residents.

4. Neither as a plea in abatement, nor as one in bar, is the pendency of a suit by the father of a minor son for the damage occasioned to him by the loss of the son's services or in any other respect any defense to an action by the mother, founded on the Act of 1887. By the terms of that act the mother is entitled to recover the whole value of the life. A claim by the father, and a suit to enforce that claim, whether it be well founded or not, cannot defeat or abridge the statutory right of the mother to bring her action and maintain it. If there is an exclusive right in either parent to complain of the homicide, it is certainly not in the father. But the truth is, there is no exclusive right, for the same tortious injury, resulting in the death of a minor child, may be a damage to both—to the mother in the arbitrary measure of damages prescribed by the statute, and to the father to the extent of his own loss, irrespective of the statute, whatever that loss may be. The Act of 1887 does not purport to withdraw from the father any right of action which he had before by the common law. What it does is to confer upon the mother a right which neither of the parents had at common law. The statutory right of the mother is to recover for the child's death; the common law

right of the father is to recover for the loss of services which the child would have rendered him had the child not been disabled by the tort complained of. *Augusta Factory v. Davis*, 87 Ga. 648.

5. There was no error in admitting evidence of the father's physical disability and consequent impairment of ability to labor. He was a laboring man and without fortune. This being so, anything which reduced his capacity to perform labor whereby to procure the means of support for the plaintiff, his wife, would render her less independent of any aid from her children, including the deceased son. The evidence, therefore, would tend to show her partial dependence on that son for support present and future. The disability referred to had its origin long before the homicide of the son, and was in some degree operative at the time of the homicide, and has been so ever since.

6. The father, mother and minor children all resided together and were mutually dependent upon the labor of the family for support. The deceased child, although not sixteen years of age, performed some labor, and it or its proceeds went into the common stock. Evidence to prove all this, or which tend to prove it, was admissible, and if this condition of affairs was established, the deceased son might well be considered as contributing substantially to the support of his mother. Members of the same household, who live by their common labor and its proceeds, have a mutual dependence one upon another. Certainly so unless it be affirmatively shown that a particular member consumes as much, or more, of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother or of a mother to a child may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal services of this nature. Moreover, in the case of laboring people some regard must be had to the probability of future dependence of an older member of the family upon younger ones. A son between fifteen and sixteen years of age, whose vocation it is to labor for the family, may well be regarded as one of the stays and props, both present and future, of his mother, she being also a laboring woman and liable to become disabled by age or infirmity before her son shall have passed the meridian of life.

7. Evidence that the son had no previous experience in traveling upon an electric car was admissible, not for the purpose of changing or affecting the measure of the company's diligence, but as a fact tending to illustrate the cause of his failure to alight in safety. The jury in looking at the facts and circumstances of the homicide would naturally desire to classify the particular passenger, not alone by his age, but also by his experience or the want of it in handling himself as a passenger on electric cars. Familiarity with this mode of transportation would qualify him to see and appreciate danger which he would not be likely to observe if he was wholly without experience. With experience he might be chargeable with fault; without it with none. And hence in the one case his failure to come off safely might be attributable to his own negligence in part or in whole, whereas, in the other case, he might be treated as free from any negligence whatever. It may be that the evidence might have other bearings, but it has this at least.

8. The negligence charged as to gates was in not having the gate of this particular car closed on the side next to the parallel track. We think what the president of the company would have testified as to his observations on other double-track lines of street cars in various cities, was not relevant, and was consequently properly rejected. Two reasons against the admissibility of this evidence occur to us: The first is, that the practice of other lines would not serve for comparison on the question of diligence, unless it was shown that these lines were properly equipped and managed or were so recognized and reputed to be by experts in the business; the other is, that it was not stated whether the other lines had gates to their cars or not, but only that gates were not used. There is no recital in the record of what was proposed to be proved by the president except what is quoted, in the 8th head-note, from the motion for a new trial. If the lines examined by the president were without gates to their cars, their practice in not using gates would throw no light on the diligence of a company which, like the defendant, has provided gates but omits to use them.

9. There may be no negligence whatever in failing to have gates, for the very highest order of equipment may be dispensed with, provided the equipment is sufficient to come up to the

standard of extraordinary diligence. This standard may be reached short of the very best or the superlative of the attainable. But when a company has provided gates, due diligence might require it to use them and failure to use them might be negligence in the given instance. Whether it would be or not is a question of fact for the jury. There was no error in so treating it. And this is so irrespective of the particular object which the company had in view in procuring the gates, or of its own practice in their use. A hackman might put brakes on his hack for use in descending mountains only, and might restrict the use by his own practice to the making of such descents, but having them upon his vehicle it might be negligence not to use them on proper occasions in descending ordinary hills as well as mountains. Extraordinary diligence may require the carrier to use what he has, though it would not require him to have as much as he has provided.

10. The charge of the court that "carriers of passengers are required to provide at points of destination places where passengers can leave their cars safely," was somewhat misleading as applied to a street railway. Companies engaged in carrying passengers on cars along a public street are not understood as engaging to make safe landing places, but to select them. The duty is to select such place with reference to getting off whilst the car is at rest. The company is not responsible for peril which the passenger incurs without its fault in attempting to alight after the stoppage has terminated and the car has again been put in motion, provided a reasonable time for alighting was allowed while it was at rest. This is true, more especially if the conductor did not know that the particular passenger intended to get off at that place, and did not see him attempting to get off in time to warn or prevent him from so doing whilst the car was in motion. The charge that "a carrier of passengers is legally bound not only to safely transport, but to furnish the means of safe egress from the trains and passage therefrom," was not applicable to the facts. There was no question about furnishing the means of safe egress, but the complaint was that the passenger was permitted to use unsafe means, and in so doing was carelessly injured by another car.

11. Of course, no duty touching the selection of a safe place for

landing passengers is operative on any stop made on account of an obstruction upon the track. When a stop is made for that reason, and there is broad daylight, by which passengers can see for themselves, if one of them undertakes to get off, whether the car be in motion or at rest, the conductor not seeing him or being aware of his purpose, he cannot complain that a safe place was not selected for him to alight. This, however, would not justify the company in negligently running over him if, by accident, he failed to gain a firm footing on alighting, but fell on a parallel track, exposing himself to danger on that track.

12. The presiding judge did not hear the improper statements made by counsel in argument, and his attention was not called to them at the time or afterwards during the progress of the trial, and no request was made to charge the jury touching the same. To say that a new trial is not required nor would be justified on this ground of the motion, is but to repeat in substance what has been ruled many, many times.

13. In charging the jury touching the measure of recovery the court said: "In determining the value of the life of deceased you consider his age, his expectancy of life, the amount he was earning when killed, his capacity to earn money in the vocations of life in which he was engaged. It is the cash value of the life that is to be given, not the gross amount he would have received during the term of years the tables say he could reasonably have expected to live. It is the gross amount reduced to present cash value." This charge was subject to misconstruction. Neither here nor elsewhere was the charge quite full enough as to the right of the jury to avail themselves of facts in the evidence irrespective of the mortality tables.

14. What may be contained in the motion for a new trial, which we pass over in silence, we deem free from substantial error. This includes the many requests to charge the jury which were denied, and some other topics besides. If the plaintiff's son had, before he was injured, succeeded in getting a footing upon the street which he could have maintained, his relation as passenger would then have ceased. But we understand the evidence as warranting the conclusion that he failed to effect a landing upon the street, and fell upon the parallel track as the result of his attempt to land and not as a sequence to a landing already

accomplished. In *Creamer v. Railroad Co.*, 156 Mass. 320, 52 Am. & Eng. R. Cas., 558, the passenger had safely landed, and when stricken by the car was walking on the street.

15. We can see no objection to allowing a plaintiff to write off from her recovery voluntarily any sum whatever. If by so doing any excess of damages found by the verdict is voluntarily relinquished, it would seem that the amount of the verdict would no longer be a cause for a new trial. Why should there be a new trial solely for the purpose of reducing the damages, when the plaintiff had voluntarily relinquished all that could be treated as excess? Other grounds for a new trial would, of course, stand unaffected.

Judgment reversed.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO. v. HUGHES.

Supreme Court, Georgia, April, 1893.

[Reported in 92 Ga. 388.]

JUMPING FROM MOVING TRAIN WHEN ORDERED BY CONDUCTOR—QUESTION OF NEGLIGENCE TO BE SUBMITTED TO JURY.—Under the declaration and the evidence, this case should have turned, as to the question of the defendant's liability, upon whether the conductor ordered the plaintiff's daughter to jump from the train while in motion, and if so, whether the daughter was free from plain and manifest fault in obeying the order. If the order was not given, or if it should have been disobeyed on account of the obvious danger of complying with it, there could be no recovery; otherwise there could be a recovery measured by the loss of services, reduced to their present net value, from the time of the injury up to the time when the daughter would attain her majority, to which should be added any expense to the plaintiff occasioned by the injury. As the daughter was about seventeen years of age, she should not be treated, with respect to her duty to care for her own safety, as a child of "tender years," but should be treated as a person who is presumptively chargeable with the exercise of the ordinary discretion possessed by young persons of her class and condition. Let the case be tried over, substantially upon the views above indicated.

FROM Dodge Superior Court. The facts are stated in the syllabus by the court.

DELCY & BISHOP, for plaintiff in error.

MARTIN & SMITH, for defendant in error.

SYLLABUS BY THE COURT.—The mother and only surviving parent of Annie Bozeman sued the railway company, alleging: As such parent she was entitled to the proceeds of the labor, as well as the services, of Annie Bozeman (who was seventeen years old when injured) until she attained her majority. Under her direction Annie paid defendant for a ticket from Cochran to Dubois, a regular station of defendant, and took defendant's regular passenger train to be carried to Dubois. When near Dubois the conductor of the train took up the ticket, and, after doing so, notified Annie for the first time that he would not stop the train at that station, and in a threatening and peremptory manner ordered her to get off, refusing to stop the train for her to do so. After she was thus ordered she went to the car door, and was followed by him to see that his order was obeyed, he being in the discharge of his duty as conductor. The train was never stopped, but she was made by him to get off while it was in motion, and got off with all the care she could; but in doing so was thrown, by the motion of the train, to the ground, falling on her side, and sustaining injuries which rendered her a helpless cripple and invalid for life. The injury was the result of defendant's neglecting to exercise ordinary care to prevent the accident, and the gross negligence and overt act of defendant contributed to and produced the accident, without fault on the part of Annie; and defendant's acts amounted to aggravating circumstances in both the act and intent. When the accident happened Annie was sound and healthy, was a house servant, and was on her way to Dubois, where plaintiff had hired her out at \$5 per month. Her services were of the value of \$150 per year to plaintiff, who has paid out for medical attention and nursing \$250, and \$200 for the support and maintenance of Annie. Plaintiff sues for the expenses, for the value of Annie's services and future expenses, and punitive damages.

The jury found for plaintiff \$600. Defendant moved for a new trial, which the court granted unless plaintiff would write off from the verdict \$216, which was done.

The motion contains many grounds, those material being assignments of error on the following extracts from the charge of the court:

"A railroad company is always liable upon the idea of negligence. The question is whether or not the road has been guilty of negligence, and such negligence as would cause the road to be liable. If the road used the reasonable diligence required in running its locomotives, cars and engines and has not been guilty of carelessness or negligence, or any improper conduct of its officers in running its cars and locomotives, then no recovery could be had. Look to the evidence and see whether or not the road has been guilty of carelessness, through their agents and employees; if they have, then the road would be liable. If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained. If you believe that she (plaintiff's daughter) was guilty of carelessness in leaving the train while it was in motion, without any negligence on the part of the conductor, then no recovery could be had. Look to the evidence and if you find the fact to be that the defendant was guilty of negligence, then your next inquiry would be what amount of damages was sustained.

"It is insisted that the conductor ordered the girl to get off of the train, and that if she did not get off he would put her off, and on the other hand that is denied, and it is also contended that a prudent person would not have obeyed that order. Whether or not that rule would apply depends on the age of the girl. It is not what a prudent man or woman would have done, but what a girl of her age, or ordinary prudence, would have done under the circumstances. If you believe that she foolishly or rashly jumped from the train, then she could not recover. If you believe the conductor ordered her off and through the excitement produced on the girl's mind by the improper conduct of the conductor she jumped from the train and was injured, then the question with you is, not what a prudent man or woman would have done, but what she would have done under those circumstances. In passing upon this matter you are to take in the whole field, look to all the circumstances of the case. What was the position of the conductor? What was the girl's age, and what was her experience in traveling? If you find that she was of tender years, and if the company has been guilty of negligence, keeping in view

the age of the girl, ascertain if she exercised the proper forethought and care for her own safety in leaving the train for one of her age."

WHITE v. ATLANTA CONSOLIDATED STREET RAILWAY CO.

Supreme Court, Georgia, May, 1893.

[Reported in 92 Ga. 494.]

IT IS NOT NEGLIGENCE *PER SE* FOR A PERSON TO ATTEMPT TO BOARD A STREET CAR BEFORE IT COMES TO A FULL STOP.—From the evidence submitted by the plaintiff, the jury might have inferred negligence on the part of the defendant, and that the plaintiff's injury was caused thereby, without such contributory negligence on his part as would bar any and all recovery. It is not *per se* negligence for a person with something in each hand to board or attempt to board an electric street car whilst it is in the act of stopping to receive passengers and before it has come to a full stop. Such boarding or attempt may or may not be negligence, according to circumstances. In this case the circumstances were not so decisive as to dispense with a jury. The court erred in granting a nonsuit. The plaintiff had an umbrella in one hand and a handkerchief in the other.

FROM the City Court of Atlanta. The facts appear in the syllabus by the court.

SMITH, GLENN & SMITH and T. J. PENDLETON, for plaintiff.

N. J. & T. A. HAMMOND and E. M. & G. F. MITCHELL, for defendant.

SYLLABUS BY THE COURT.—White sued for personal injuries, and was nonsuited. He testified: "I was hurt by one of defendant's electric cars on Whitehall street, Atlanta, on a Saturday evening. I was with Bradwell. When we got to Whitehall street no car was in sight, and we walked along until we got to an alley between Hood and Cooper streets, a very wide block, when we saw it coming. I waved it down, and it came nearly to a standstill as it got to the alley. It was an open car going very slowly; I cannot tell exactly how fast; slowly enough for a child to step on. I had an umbrella in one hand and a handkerchief in the other. As the car passed the alley I started to get on, stepped on the running board and attempted to catch hold of the hand-hold at the same time; did not get my hand on the hand-hold; just as

I stepped up and caught at the hand-hold the car made a sudden and violent jerk which prevented my getting my hand on the hand-hold, and knocked me to the ground. The car started off very swiftly. The fall crushed my right hip. I have often got on and off the car at that place. The car stopped there for passengers. I took the car at that point when I went from home to the factory where I worked.

Bradwell testified: When we got to the alley we saw a car coming, and we stopped. White waved the car down with something he had in his hand. The motorman turned off the current and put on brakes, and the car came nearly to a standstill; as it got to the alley it was going about as fast as a business man would walk. A child could have got on it without harm. It was coming down grade, and when it got a hundred yards from us, was running from sixteen to eighteen miles an hour. We attempted to get on the car. I stepped on the board by the side of the car, a plank or foot-board by the side of the car to step up on. Simultaneously with stepping on the foot-board I caught at the hand-hold on the car, but was thrown down before getting hold of it. The car made a violent jerk and started off with a whiz, and that prevented me from getting hold of the hand-hold and threw me to the ground. White was hurt; I was not.

MILLER v. EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO.

Supreme Court, Georgia, March, 1894.

[Reported in 93 Ga. 630.]

PLAINTIFF ALIGHTING FROM TRAIN AFTER STATION CALLED BY CONDUCTOR AND AFTER TRAIN STOPPED IN DANGEROUS PLACE—NONSUIT ERROR.—Whether the railway company, having stopped the train immediately after the conductor called out the station, failed in extraordinary diligence towards the plaintiff by not warning him that the station had not been reached, so as to prevent him from alighting in the darkness of the night at an unsafe place, and whether the plaintiff, a youth of seventeen years, was negligent in so alighting without first assuring himself that the station had been reached or that the place was safe, are questions more proper for submission to a jury than for determination by the court on a motion for a nonsuit, and the granting of a nonsuit was error.

FROM Floyd Superior Court. The facts appear in the opinion. DABNEY & FOCHE and J. S. FOCHE, for plaintiff.

MCCUTCHEN & SHUMATE and HOSKINSON & HARRIS, for defendant.

Simmons, J.— Miller, a youth of seventeen years, was a passenger on the defendant's train from Rome to Cave Spring. As the train approached Cave Spring, the usual signal of approach to the station was blown by the whistle of the locomotive, and shortly thereafter the conductor came into the car where the plaintiff was, and called out "Cave Spring" twice, and then went out of the front door. The plaintiff arose and went to the rear door of the car, supposing the train was about to stop at the station. It stopped about two hundred yards before reaching the station. It was about ten o'clock at night. The night was dark and drizzly, and the train was late. As soon as the train stood still, the plaintiff, thinking it was at the station, stepped off in the darkness and fell into a ditch sloping off from the ends of the cross-ties, and was thereby seriously injured. These facts, with the others which appear in the record, it is true, do not make a very clear case for a recovery against the railroad; but whether the conductor failed in extraordinary diligence in not warning the plaintiff that the station had not been reached, so as to prevent him from alighting in the darkness of the night at an unsafe place, and whether the plaintiff was negligent in so alighting without first assuring himself that the station had been reached, or that the place was safe, were questions more proper for submission to a jury than for determination by the court on a motion for nonsuit. In cases of this kind, where the right to recover is doubtful, it is the better practice to leave the matter to be passed upon by the jury. The jury is the tribunal upon which the law imposes the duty of determining doubtful questions of fact. See *Wood v. Georgia R.R. Co.*, 84 Ga. 363; *Ray on Imp. Duties, Pass. Carr.* § 47, pp. 139, 141, citing *N. J. Cent. R.R. Co. v. Van Horn*, 38 N. J. L. 133, and other cases, in which the facts were somewhat similar to those presented in the case at bar.

Judgment reversed.

OUTEN v. THE NORTH & SOUTH STREET RAIL-ROAD CO.

Supreme Court, March Term, 1894.

[Reported in 94 Ga. 662.]

ALIGHTING FROM MOVING CAR—WHEN NONSUIT SHOULD BE GRANTED.—In an action to recover damages for injury sustained while alighting from a moving car, where plaintiff by his own evidence showed, that although he had requested the driver of the street car to stop at a designated place and had received a rude and profane answer, yet upon failure of the driver to stop, plaintiff had jumped from the car while it was in motion, and without again requesting the driver to stop or notifying him of his purpose, then to alight; and it not appearing that the driver, when he struck the team, knew that the plaintiff was attempting to alight, or that there was any such emergency as would justify the plaintiff in alighting from the moving car: *Held*, no error in granting a nonsuit.

FROM the City Court of Floyd County. The facts appear in the syllabus by the court.

HAL. WRIGHT, for plaintiff.

SYLLABUS BY THE COURT.—Outen sued the street railroad company, and was nonsuited. His testimony was, in brief: He boarded defendant's horse-car and paid his fare into the box. Driver told him he would put him off wherever he desired. Before he arrived at his destination he told the driver he desired to alight at the telegraph post about fifty yards ahead. On approaching that point he again told the driver he wanted to get off there. Driver replied, "I will stop; but if I don't, by G—, jump off." He was standing at this time on the front platform with the driver; three other persons also were on the front platform, and the car was crowded inside. His elbow or right arm was pressing up against the driver. The driver did not stop at the designated point, but about fifty feet beyond slackened up to a slow gait, his horses walking, and the car moving about as fast as a man would in a "peart" walk. Plaintiff (who was about seventy years old) went upon the steps to get off, placed his hand upon the iron railing of the car, his left foot on lower step, raised his right foot and stepped out straight from the car "a little in this direction" (indicating to the rear of car). Just

while in this effort, the driver hit the horses and the car gave a sudden jerk, which threw plaintiff on the road, inflicting injuries. The car did not stop, but moved rapidly on.

Judgment affirmed.

THE CHICAGO, ROCK ISLAND & PACIFIC RAIL-ROAD COMPANY v. DINGMAN.

Appellate Court, First District, Illinois, April, 1878.

[Reported in 1 Ill. App. 162.]

PASSENGER ALIGHTING FROM TRAIN ON SIDE OPPOSITE PLATFORM.—A passenger who after the train stopped and the station was announced by the conductor went out of the rear door of the car and stepped off on the side opposite that on which was the platform, and fell into a culvert and was injured, and it appeared that all the other passengers went out of the front door of the car and were assisted in alighting by the conductor who stood there for the purpose, and the night was dark, such passenger was guilty of negligence that would not permit her to recover damages for the injury.

APPEAL from the Circuit Court of Cook County. The facts appear in the opinion.

THOMAS F. WITHROW, for appellant, cited: Penn. R.R. Co. *v.* Zebe, 37 Pa. St. 420; Lewis *v.* L. C. & D. R'y Co., 22 L. T. (N. S.) 397.

A. GARRISON and M. D. BROWN, for appellee, cited: Rowle *v.* Hughes, 40 Ill. 316; Ryan *v.* Brant, 42 Ill. 78.

Bailey, J.—This was an action on the case, brought by appellee against appellant, to recover damages for injuries which appellee alleges she received while alighting from one of appellant's cars, at Thirty-first street, in the city of Chicago.

It appears that on the evening of the 10th day of December, 1873, appellee entered one of appellant's cars, at the station between Forty-seventh and Forty-eighth streets, paid her fare, and requested the conductor to let her off at Twenty-ninth street. He informed her that the train did not stop there, but stopped at Thirty-first street, where he would let her off. Appellee then asked the conductor to show her off on arriving at Thirty-first street, and he said he would do so.

At the time it was raining, and very dark. When the train reached Thirty-first street, the conductor came with a lantern in his hand to the north or front door of the car in which appellee was sitting, and announced the station, and then stepped down on the easterly side of the car at the front platform, and helped several passengers to alight from the train.

Appellee was sitting near the rear end of the car. She admits that she saw and heard the conductor as he came to the front door with a lantern and announced the station. Instead, however, of going to the front door where the conductor was, and where he was ready to assist her in alighting, she went to the rear door and stepped down on the westerly side of the car, it being so dark at the time as to render it impossible for her to see where she was likely to land, and in so doing, as she testifies, fell into a culvert situated on the westerly side of the track, and received the injuries of which she now complains.

The only reason appellee assigns for getting off at the rear end of the car, is, that she was sitting nearest that end, and feared that, if she went to the front door, the cars might start before she got off. The record, however, fails to disclose any ground whatever for such fear. She testifies that the conductor, as soon as he had announced the station, disappeared from her view, but admits her inability to state whether he stepped down with his light and helped passengers off at the front end of the car, as she went out by the rear door and stepped down on the other side. A bystander, however, testifies positively to seeing the conductor step down from the platform, after announcing the station, and help off some ten or twelve passengers.

It is alleged that appellant was negligent in leaving the culvert uncovered; in stopping the car where passengers, alighting, might fall into it, and in allowing appellee to get off over the culvert without any light or warning of danger. On the other hand, it is charged that appellee, in alighting from the car in the manner she did, was guilty of such a degree of negligence as must preclude her recovery.

It is unquestionably the duty of railway companies to provide for their passengers safe and convenient places for landing from their cars, and to furnish them with every reasonable facility for alighting with safety; but it is also incumbent on the passengers

to exercise on their part due care and caution to avoid injury. Where a proper landing place is provided, and the passenger knows or has the means of ascertaining its locality, he should make his exit at the place so provided, and if, in attempting to alight elsewhere, he unnecessarily and negligently exposes himself to danger, and is thereby injured, his injury is the result of his own act, and he cannot recover damages therefor against the railway company.

In this case, it is not disputed that there was a safe and convenient landing place at the front end of the car; nor can it be doubted that had appellee attempted to pass out of the front door she would have had the assistance of the conductor, and would have had the benefit of the light of the conductor's lantern. She had requested his assistance because of its being so rainy and dark, and he had promised to give it. The conductor, on reaching the station, had appeared at the front door, and announced the station, thus notifying her where to go to avail herself of his assistance. It was but the dictate of the most ordinary prudence, under these circumstances, for her to go to the front door, and thus avail herself of the services of the conductor, which she had bespoken, and which she was invited to accept. The position of the conductor on the train was, under the circumstances, notice to her of the place where it would be safe to alight. Her conduct in going out of the rear door instead, and stepping off from the car on the side opposite to one where the conductor was standing with his lantern, and where it was so dark as to render it impossible for her to discern where she was about to land, is, in the light of the evidence, wholly irreconcilable with ordinary prudence on her part. We think her injury was the result of her own careless act, and it would be contrary to well established rules of law to permit her to recover damages therefor against appellant.

It is further insisted by appellant's counsel that the preponderance of the evidence shows that appellee was not, in fact, injured in the manner she claims. On this question the evidence was so far conflicting that we do not feel called upon to review it, and so express no opinion upon the point here made.

We think, however, the jury, in passing upon the question of appellee's negligence, found against the clear and manifest pre-

ponderance of the evidence, and for that reason we feel compelled to reverse the judgment, and direct that the cause be submitted to another jury.

Reversed and remanded.

ST. LOUIS, ALTON & TERRE HAUTE RAIL-ROAD COMPANY v. BERGER.

Appellate Court, Fourth District, Illinois, August, 1881.

[Reported in 9 Ill. App. 341.]

PASSENGER ALIGHTING FROM TRAIN.—Where the weight of evidence overwhelmingly showed that a passenger train came to a full stop at a station and remained there for a longer time than usual, and made no movement until it started again on its journey, and the plaintiff testified that she was injured while alighting by reason of the train being violently started, the verdict for plaintiff was palpably against evidence and a new trial should have been granted when requested.

APPEAL from the Circuit Court of St. Clair County. The facts appear in the opinion.

R. A. HALBERT and C. F. NOETLING, for appellant, cited: *Robertson v. Dodge*, 28 Ill. 161; *C. & A. R.R. Co. v. Gretzner*, 46 Ill. 74; *Hartford Ins. Co. v. Gray*, 80 Ill. 28; *Evans v. George*, 80 Ill. 51.

WM. WINKELMAN and A. S. WILDERMAN, for appellee.

Baker, J.—After a careful consideration of all the testimony contained in this record, we are of opinion it does not sustain the verdict of the jury. There can be no claim there is evidence even tending to prove the third count of the declaration. The only testimony to prove the second count, *i. e.*, that “while she (plaintiff) was, with the consent and permission of said company, and with due care alighting from said train, the same was caused to be suddenly and violently started and moved, by means of which she was violently thrown to the ground, and her foot run over by the cars and mashed,” is that which appellee gives in her own behalf. The overwhelming weight of the evidence shows that the passenger train came to a full stop when it arrived at Freeburg on the night in question, remained at the station for a longer time than usual, and for from three to five minutes, and made no movement after it once stopped until it moved off from the station for St. Louis. And the evidence conclusively shows it is a physical

impossibility the injury could have been occasioned in the manner and under the circumstances stated by appellee in her testimony, or by the means alleged in this count.

The first count is of very doubtful import. It alleges the train was not stopped and slackened at Freeburg, so as to enable plaintiff to get off; that it was started after it was stopped; that plaintiff was thrown upon the ground, and that her foot was crushed between the platforms of the cars. As we have seen, the train was stopped at Freeburg, made a good stop and at the proper place, and made no movement thereafter until it started off; moreover, the evidence shows the cars were provided with Miller platforms and air-brakes, and that they were all in good condition. We find nothing in the record, outside of the statements of appellee, even tending to prove either the negligence charged, or negligence of any kind on the part of appellant or its employees. The statements of appellee are uncertain, contradictory, unreasonable, frequently in conflict with numerous other witnesses, and corroborated by no one. There is no doubt she was seriously injured, and probably by the cars of appellant; but by what particular means thus injured is left in uncertainty. Indeed, what there is about a car or train of cars that is capable of inflicting an injury of the character of that received by her is a mystery, a solution of which is not suggested, either by the numerous experts examined or by counsel.

We think the verdict was so palpably against the evidence that it cannot stand; and that the motion for a new trial should have been allowed. Objection is made to the two instructions given for appellee. They are objectionable, and probably misled the jury. The one directs them to find a verdict for plaintiff, if they find she, without negligence on her part, was injured "through the fault or negligence of the defendant"; and the other, if they find the injury was occasioned "by the negligence of the defendant." They should have called attention to the specific acts of negligence alleged in the declaration, and without proof of which, substantially, there could be no recovery. These instructions by the general terms used therein opened a wide field for speculation on the part of the jury, as also did the use of the word "fault" in the first instruction.

The judgment is reversed and the cause remanded.

THE HANNIBAL AND ST. JO RAILROAD COMPANY V. MARTIN. (1)

Appellate Court, Third District, Illinois, May, 1882.

[Reported in 11 Ill. App. 386.]

RAILWAY COMPANY LIABLE FOR ACTS OF SERVANTS OF ANOTHER COMPANY.—A passenger waiting on a station platform for a train to be made up was informed by a railway employee that the train was ready, and entered one of the cars, but finding it full, by invitation of another employee, attempted to enter the forward car, and fell between the two because they were not coupled, and the forward car was drawn away by a switching engine. In an action for damages for the injuries it appeared that the employees of defendant had nothing to do with making up the train. *Held*, that the fact that the defendant had contracted with another company to do defendant's switching, or even operate its trains, did not relieve its responsibility as a common carrier.

RELATION OF CARRIER AND PASSENGER CREATED.—A person having a ticket and entering a car by invitation of an employee of a railway company, or in obedience to an announcement that the cars are ready to receive passengers, is a passenger.

Declarations of a conductor made an hour after the accident occurred are not admissible in evidence.

APPEAL from the Circuit Court of Adams County. The facts appear in the opinion.

MARSH & MCFADON, for appellant, cited: 1 Greenl. Ev. § 113; Story on Agency, § 134; Ang. & Ames on Corp. § 309; 2 Id. § 267; Verry v. B. C. R. & M. A. Co., 47 Iowa, 549; M. C. R.R. Co. v. Gougar, 55 Ill. 506; Lane v. Bryant, 9 Gray, 247; C. & N. W. R.R. Co. v. Fillmore, 57 Ill. 266; Furst v. Second Ave. R.R. Co., 72 N. Y. 544; C. B. & Q. R.R. Co. v. Riddle, 60 Ill. 534; C. B. & Q. R.R. Co. v. Lee, 60 Ill. 503; Luby v. H. R. R.R. Co., 17 N. Y. 131; Pittsburg R.R. Co. v. Theobald, 51 Ind. 246; Rogers v. McCune, 19 Mo. 562; Whitaker v. Eighth Ave. R.R. Co., 51 N. Y. 299; Robinson v. R.R. Co., 7 Gray, 97; Hutch. on Carr. § 805; Shear. & Redf. on Neg. § 597; Ill. Cent. R.R. Co. v. Sutton, 53 Ill. 399; Ill. Cent. R.R. Co. v. Frelka, 9 Brad. 605; Ill. Cent. R.R. Co. v. Benton, 69 Ill. 175; Nichols v. Bradsby, 78 Ill. 44; C. B. & Q. R.R. Co. v. Sykes, 96 Ill. 172; C. & A. R.R.

1. Affirmed in 111 Ill. 219, 2 Am. Neg. Cas. 661.

Co. *v.* Randolph, 53 Ill. 514; C. R. I. & P. R.R. Co. *v.* Payzant, 87 Ill. 130; Kepperley *v.* Ramsden, 83 Ill. 356.

EWING & HAMILTON, for appellee, cited: Abbott's Tr. Ev. 44, 600; 1 Greenl. Ev. § 113; Bank *v.* Field, 2 Hill, 445; Bass *v.* C. & N. W. R.R. Co., 42 Wis. 654; H. & B. M. R.R. Co. *v.* Decker, 82 Penn. 119; Deniston *v.* Hoagland, 67 Ill. 265; Thompson *v.* McLaughlin, 66 Ill. 407; Creote *v.* Wiley, 83 Ill. 444; Carpenter *v.* Davis, 71 Ill. 396; E. N. N. R.R. Co. *v.* Henderson, 51 Penn. 320; Bryant *v.* Trimmer, 47 N. Y. 96; I. & St. L. R.R. Co. *v.* Stables, 62 Ill. 320; C. B. & Q. R.R. Co. *v.* Sykes, 96 Ill. 172; Ill. Cent. R.R. Co. *v.* Parks, 88 Ill. 373; Ill. Cent. R.R. Co. *v.* Cunningham, 67 Ill. 316; C. W. Div. R'y Co. *v.* Hughes, 69 Ill. 170; C. & A. R.R. Co. *v.* Wilson, 63 Ill. 167; C. & A. R.R. Co. *v.* Murray, 71 Ill. 601; P. C. & St. L. R.R. Co. *v.* Thompson, 56 Ill. 138.

Higbee, J.—This suit was brought by appellee to recover for a personal injury received by her while a passenger on appellant's cars.

On the 16th day of February, 1880, appellee and her husband bought coupon tickets entitling them to a passage by rail from Canton, Illinois, to Nickerson, Kansas. One coupon of the tickets was from Quincy to Kansas City, over appellant's road.

On the evening of the same day appellee and her husband arrived at Quincy, and were there detained until ten o'clock of the same night, when they left on appellant's road for Kansas City.

Appellant has no track or depot on the east side of the Mississippi River, but after crossing the bridge, its passenger trains run into the depot of the Chicago, Burlington & Quincy Railroad Company, over its track. By agreement of parties, all switching in the yard and making up trains is done by the employees of the latter company, and when the trains are made up and ready to leave, appellant's employees then take charge of them.

When the train was being made up, someone, whom appellee thinks she afterwards saw on the train as conductor, announced that the train was ready, whereupon appellee and her husband followed several others to the south end of the platform and entered the rear car. Finding the same full of passengers, they passed on to the next car in front, and not finding any vacant seats, went on

to the north end of the third car, where appellee found a seat, but her husband and ten or fifteen other passengers could get no seats and had to stand up. A brakeman told the passengers to be patient a moment and they would put on another car. Just then a car was backed down against the one appellee was on, and the brakeman announced that the car was ready, when appellee attempted to enter the same and fell between the cars and was severely injured.

At the time of the accident the front cars were attached to the switch engine, and an effort being made to couple the cars, which was then unsuccessful, but soon after accomplished.

The first assignment of error we will notice questions the action of the court in modifying appellant's fifteenth instruction before giving the same to the jury. The substance of that instruction was, that if the jury believed from the evidence that appellant had, on the night appellee was injured, a platform in the Chicago, Burlington & Quincy depot at Quincy, designated by it for the reception of passengers, and that appellee was injured while said train was being made up and before it had been put in position to receive passengers, then that the relation of passenger and carrier did not at the time of the injury subsist between appellant and appellee, and the jury should find for the defendant.

The court refused to give this instruction as asked, but gave it as modified by adding the following words: "Unless the jury further believe from the evidence that the agent or servant of the defendant had notified plaintiff that said train was ready for the reception of passengers, and that in pursuance of such notice, said plaintiff had got on said train of cars before she received the alleged injury, if the jury believe from the evidence she received any injury."

The three rear cars stood on the track by the side of the platform used by the Hannibal & St. Jo Railroad, and the evidence tends strongly to show that at or about the usual time of the departure of the train, it was announced by one of the employees of appellant, most probably, from the evidence, the conductor, that the train was ready, when appellee and her husband followed several others aboard of the cars and found all three of them filled with passengers.

If a person holding a ticket entitling him to a passage on the

train may not enter the cars and become the passenger of the common carrier under such circumstances, it is difficult to see just when and how the relation of passenger and carrier could be created.

We see no error in the modification of this instruction.

Appellant also assigns for error, the giving appellee's third instruction, as follows: "Although the jury may believe from the evidence that the defendant's train of cars, testified about by the witnesses in this case, was made up by the servants and employees of the Chicago, Burlington & Quincy Railroad Company, and that such servants and employees had the control and management of said cars until said train was made up and ready to start on its run over the defendant's road, still, if the jury further believe from the evidence that said servants and employees of the Chicago, Burlington & Quincy Railroad Company so made up and had control of said train and cars with the consent of the defendant, and under an agreement between the defendant and said Chicago, Burlington & Quincy Railroad Company, then the court instructs the jury that, for the said purpose of making up and managing said train and cars until said train was ready to start on its regular run, the said servants and employees of the Chicago, Burlington & Quincy Railroad Company, so engaged, were the servants and employees of the defendant."

Appellant was a common carrier of passengers and property between Quincy and Kansas City for hire, and as such, it was its duty to manage its trains by careful, sober and skillful servants. It alone had the power to employ and remove the servants by whom its trains were managed, and it must be held responsible for their conduct.

It matters not whether these servants in the management of its trains, on the road upon which they ran and over which appellee's ticket entitled her to pass, were employed and paid personally by the officers of appellant road, or by some other person or corporation employed by appellant to have the service performed for it.

Appellant operated its road in its own name and for its own gain, and the fact that it contracted with the C. B. & Q. to do its switching or even operate its trains, can not relieve it from its responsibility to the public as a common carrier.

It contracted with appellee to safely carry her from Quincy to

Kansas City, and when she entered the car and became a passenger upon appellant's road, it became liable for her safe transportation, and for all negligence of those whom it had authorized to manage its trains for it.

It is also contended by appellant that the trial court erred in permitting appellee and her husband to testify to the declarations of Griswold, the conductor of appellant's train, made after the accident had occurred. Hugh Martin, the husband of appellee, testified that his wife was unconscious for about one hour after the accident; that after she returned to consciousness they had a conversation with Griswold, the conductor on the train, in reference to the accident. Said witness was permitted to testify, against the objections of appellant, as follows: "The conductor inquired in regard to how the matter occurred; it seemed he did not know anything about it. I told him how it occurred; said he, it is carelessness. He said there had been a great deal of carelessness or recklessness, something of that kind, on the part of the *attaches* of the road. If you want me to tell all of it, he said really he felt afraid himself, and he wanted to get our names to report to headquarters."

Appellee also testified, against a like objection, that in the conversation referred to by her husband, the conductor said that "the men or the hands on the road had become so reckless that they ought to be reported, and he would report them. He said we ought to prosecute them because they had become so reckless."

It is a sufficient reason why this evidence should not have been admitted, that the conductor was talking about a matter he knew nothing, personally, about, so far as he referred to the accident by which appellee was injured.

It is insisted by appellee's attorney, that this evidence was admissible as part of the *res gestæ* of the accident by which she was injured. To be receivable upon this ground, the declaration must have been made at the time the accident occurred, and have reference to that transaction. Most of the statements refer to other transactions, and have no reference to the accident by which appellee was injured.

These declarations were by appellant's servant, not in the course of his duty, made—not under oath—about a matter in reference to which he was competent to testify as a witness.

They did not accompany the principal act, or tend in any way to elucidate it, nor were they a part of the *res gestæ*. They are no more competent because made only a short time after the accident had occurred, than if made a year after.

When the principal transaction was ended, from that moment the servant had no authority to bind his principal by anything he might see proper to say about it. His evidence was the merest hearsay, and should not have been admitted.

These declarations were of a character most damaging to appellant, and the court having admitted them as competent proof, the jury, in the sharp conflict in the evidence as to the manner in which the accident occurred, would be likely to regard them as the admissions of appellant, made by its authorized servant or agent, and therefore binding upon it.

That the declarations of the conductor that the road was so carelessly or recklessly managed that he was afraid of it himself, had a damaging effect upon the rights of appellant, is demonstrated in a verdict for damages which we regard as large for the injury received by appellee.

Judgment reversed and cause remanded.

CHICAGO, MILWAUKEE & ST. PAUL RAILROAD COMPANY V. WEST, BY NEXT FRIEND. (1)

Appellate Court, Illinois, First District, March Term, 1887.

[Reported in 24 Ill. App. 44.]

INFANT RIDING UPON ENGINE AT INVITATION OF ENGINEER AND ALIGHTING FROM SAME WHILE IN MOTION—RAILROAD COMPANY LIABLE FOR INJURY.—In an action to recover damages for injury sustained by plaintiff, an infant, while alighting from an engine when in motion, and which he had boarded at the invitation of the engineer, the latter having no authority to invite persons to ride upon the engine, it was *held*, that, although plaintiff was a trespasser, it was the duty of the railroad company to exercise care and prudence in putting him off the engine, and the company was liable for the acts of its servant in causing the plaintiff to jump off the engine while it was in motion.

1. Affirmed in 125 Ill. 321, 2 Am. Neg. Cas. 672.

APPEAL from Superior Court of Cook County. The facts appear in the opinion.

E. WALKER, for appellant.

SELDEN FISH, for appellee.

Moran, P. J.—The evidence introduced in this case, on the trial in support of the plaintiff's cause of action, tended to show that plaintiff, being at the time about seven years of age, was invited by the engineer to get upon the engine which was used for switching cars upon defendant's tracks; that after riding up and down in the yard several times, and when the engine was moving, the engineer said to the plaintiff that the "old man," meaning the yardmaster, was coming, and told him to get off; that in obedience to such command plaintiff climbed down the steps of the engine, and in attempting to reach the ground his foot was caught under the wheels and crushed. That at the time the engineer told the plaintiff to get off, the engine was moving about as fast as the plaintiff could run, and it was not "slowed up" to enable the plaintiff to get off. The evidence introduced in behalf of defendant was in almost all particulars in conflict with that of plaintiff, and the verdict must be regarded as settling the issues of fact, and as the verdict is supported by the evidence the judgment must stand, unless there was some error of law committed by the trial court which shall be found to require a reversal of the case.

It is contended by appellant's counsel that the railroad company cannot be held liable for an injury occurring in consequence of the act of its employee which was not done in the line of his duty, but was, in fact, in direct violation of the express rules of the company. It is shown that there were plain instructions hanging up in the cab, not to allow anyone to ride on the engine except employees, and the rule of the company was shown to be as follows: "No person will be allowed to ride upon the engine except roadmasters on their own divisions, conductors or forward brakemen of the train, without permission from the superintendent or master mechanic. Every engineer will be held responsible for the strict enforcement of this rule."

It is apparent that the engineer had no authority to invite the boy upon his engine, and that his doing so was a palpable violation of the rule which the company had laid down for the govern-

ment of his conduct; but it is also manifest that the boy who got on in obedience to the invitation could be in no worse position than if he had stolen on without the notice of the engineer, or jumped on as the engine was starting, against the direct order of the engineer that he should keep off. So far as the relation of the company is concerned, the boy, whether he got on at the engineer's invitation, or against his command, was a trespasser, and it may be conceded that if, while riding upon the engine, even by the invitation and permission of the engineer, he had been injured by reason of some negligence in the management or operation of the engine or the road, the company would not be responsible. Being a trespasser, the company would owe him no duty of protection against the ordinary perils of the position which he voluntarily assumed. But when the injury results from the direct act of a servant of the company in endeavoring to enforce the rule of the company, a different question is presented.

The boy had no right to remain on the engine, but he had a right to be exempted from the peril of gross carelessness on the part of defendant's servants in removing him therefrom, and they were bound to exercise toward him, in putting him off, care and prudence, so that in enforcing the rule of the company no injury should be inflicted, which, in view of all the circumstances, reasonable caution on their part could prevent.

It is sought to treat the act of inviting the boy on the engine, allowing him to ride thereon and the ordering him off, as one continuous act of the engineer, all without authority, and hence creating no liability against the company. We cannot perceive that the fact that the servant of the company violates its rules can relieve the company from liability for his wrongful acts, when he afterwards undertakes to obey and enforce them. That the rule of the company in evidence authorized the engineer to remove any person wrongfully upon his engine, whether the entry there was in its inception by his invitation or against his will, there can be no doubt. In removing the intruder he was doing the will of the company, and his act cannot be regarded as willful and unauthorized. When the act is authorized by the master he is always liable for the negligent or improper execution of it by the servant. So it was held that the company was liable where a baggage-man forced a boy, who got on the rear platform of a baggage car

which was being switched, to jump off while the car was in motion and at a dangerous place, the rule of the company posted up in the car being as follows: "No person will be allowed to ride on this baggage car, except the regular train men employed thereon. Conductors and baggage men must see this order strictly enforced." *Rounds v. D. & L. W. R.R. Co.*, 64 N. Y. 129.

In *Holmes v. Wakefield*, 12 Allen, 580, where the instruction of the company was, "The conductors will not allow any person to ride in any freight car attached to their trains," it was argued that this direction only authorized the conductor to prevent persons getting on the car, but did not require him to remove them, especially after the car was in motion. The court said: "We do not think the effect of the instruction can be so limited. It plainly made it his duty to prevent any persons riding on a freight car. This he might do in any lawful and proper manner, by the use of reasonable force to prevent getting upon the car, or removing a person who had got upon the car in violation of the rule. The wrong to the plaintiff consisted in using force unreasonably; that is, at a time and under circumstances which made it dangerous to his life or limb."

It is urged that there is no evidence in the record which shows that the engineer used or even threatened to use any force. The evidence is that he said to the boy, "Cheese it, the old man is coming," and told him to get off. Whether what was said and the manner of saying it to the boy of seven years was equivalent to actual force, was for the jury to say. As was said by the court in *Lovett v. S. & S. D. R.R. Co.*, 9 Allen, 557, in answering a similar objection, "His obedience would be naturally expected, without regard to the risk he might incur, and in respect to a child so young, the command would be equivalent to compulsion."

It was, we think, the plain duty of the engineer not to direct the boy to get off the engine till he had stopped it, or at least to have "slowed up" so that the descent from the engine would be rendered reasonably safe. *Kline v. C. P. R.R. Co.*, 37 Cal. 400.

We have examined the instructions given for plaintiff, and find them in substantial accord with the views above expressed and quite as favorable to the defendant as it had a right to ask. We think, also, that the court was right in declining to give defend-

ant's instructions which were refused. We find no error in the record, and the judgment of the Superior Court will therefore be affirmed.

Judgment affirmed.

CHICAGO CITY RAILWAY CO. v. ROBINSON.

Appellate Court, Illinois, First District, May, 1888.

[Reported in 27 Ill. App. 26.]

RAILROAD COMPANY NEGLIGENT IN RUNNING TRAIN RAPIDLY OVER A CROSSING—DEATH OF CHILD.—A railroad company that rushes its train over a street crossing at a rapid speed, without signal or warning, while a train bound in the opposite direction is discharging passengers at the crossing, is guilty of negligence and is liable in damages for the death of a boy five and one-half years of age, who alighted and attempted to run from the standing train across the track upon which was the on-coming train.

WHEN NEGLIGENCE NOT IMPUTED TO PARENT.—When a child that is injured is in the exercise of ordinary care the question of the parent's negligence does not arise.

APPEAL from the Superior Court of Cook County. The facts appear in the opinion.

HYNES & DUNNE, for appellant.

FRANK J. SMITH & HELMER and **MELVILLE W. FULLER**, for appellee.

Per Curiam.—The action in this case was brought to recover damages for killing the child of appellee through the alleged negligence of the servants of appellant.

Appellant was operating a double-track street car line on State Street, in Chicago, and the trains, each of which consisted of a "grip" and one or two passenger cars, were driven by a cable running beneath the surface of the road at a speed of seven miles an hour. There was a gate across the platform of each car on the side toward the track on which the trains traveled in opposite directions, which prevented passengers from getting on or off the cars on that side of the train.

Plaintiff's evidence tended to show that on the morning of the accident, the plaintiff, with her boy, five and one-half years of age, and some relatives with their children, got on a north-bound

train, on State Street, on their way to attend a funeral, and rode to Twenty-fourth Street, intending to proceed west on the north side of said street. The train stopped on the north foot crossing of Twenty-fourth Street and the party alighted from the east side of the rear platform. A boy about nine years old, who was of the party, was the first to get off, and next to him the deceased, closely followed by his mother. The older boy ran westward across the west track of appellant and the deceased ran after him, and was struck by the "grip" of a south-bound train and killed.

The running of the cable over the pulleys in the street and through the "grip" of the standing car made considerable noise, and the approach of trains is almost noiseless, and the south-bound train was not heard by plaintiff's witnesses, and their evidence tended to show that there was no bell or gong sounded, and no signal or warning of the approach of the train given, and that the movement of the train was very rapid. The standing train obstructed the view of the west track, so that persons alighting from said train on the east side would not see the south-bound train until it passed the rear of said standing cars.

On the close of plaintiff's evidence, counsel for the defendant company moved the court to instruct the jury to find for the defendant on the ground of the absence of proof of due care on the part of plaintiff, and the absence of proof of negligence on the part of defendant. The court overruled the motion, and this is the principal ground of error urged upon us for a reversal of the case.

We are of opinion that the court properly overruled said motion. The questions whether deceased was in the exercise of reasonable care, and whether the defendant company was guilty of negligence, were properly questions for the jury to determine. Appellant's counsel invokes the doctrine that it is negligence *per se* to cross a railroad without stopping and looking to see that there is no approaching train, and argues that as there is no proof that defendant's train was running at an unlawful rate of speed, they could not be held guilty of any negligence.

The doctrine invoked is not to be applied as a hard and fast rule in every case of an injury, even at crossings of steam railroads. Ordinary care and prudence under all the circumstances in the particular case is all that the law requires, and it is ordin-

arily for the jury to decide whether, under the circumstances, a failure to stop until the view is clear, and look for an approaching train, is such negligence as should defeat a recovery.

We are not willing to state, as a matter of law, under all the circumstances of this case, that deceased was, at the time of the injury, guilty of a want of ordinary care, nor can we say that the evidence did not warrant the submission of the question of defendant's negligence to the jury. To rush a train going in one direction over a street crossing at a rapid speed, and without signal or warning, while a train bound in the opposite direction is discharging passengers at a crossing, and where persons young and old are liable to be crossing the street, is such an act as, in our opinion, fully warrants the conclusion of negligence.

In passing on this branch of the case we of course consider only plaintiff's evidence, and the inferences that can be reasonably drawn from it. There is a sharp conflict on several points when defendant's evidence is looked at, but the conflict has been settled by the verdict in favor of the plaintiff.

There is one objection urged against an instruction given, and that is, that plaintiff's instruction excluded the question of the mother's negligence, if any, from the consideration of the jury. The plaintiff's theory was, that the child was in the exercise of ordinary care, and hence that no negligence could be imputed to the parent. This is the rule of law. *Ihl v. Forty-second Street R.R. Co.*, 47 N. Y. 317; *Cummings v. Brooklyn City R.R. Co.*, 6 Cent. Rep. 394.

The court instructed the jury very fully as to the question of the mother's negligence, at the request of defendant, and considering the instruction as a series, the whole law arising upon all theories of the case was given to the jury.

We are of opinion that the judgment of the Circuit Court should be affirmed.

Judgment affirmed.

MCNULTA v. ENSCH. (1)

Appellate Court, Third District, Illinois, February, 1889.

[Reported in 31 Ill. App. 100.]

RAILROAD LIABLE FOR FAILURE TO MAKE SUFFICIENT STOP TO LET OFF PASSENGERS.—If, after the announcement of a station, a train comes to a stop about the usual time and at the station platform, a passenger is justified in presuming that the stop is for the purpose of getting off, and if he is injured while alighting, by reason of the train immediately starting up again, the company is liable, and cannot avoid liability by stopping the train a short distance beyond and there giving ample time for discharging passengers.

IN error to the Circuit Court of Sangamon County. The facts are stated in the opinion.

G. B. BURNETT and ISHAM, LINCOLN & BEALE, for plaintiff in error.

CHARLES A. KEYES, for appellee.

Pleasants, J.—On the night of January 14, 1888, defendant in error was a passenger on the lightning express train of the Wabash Railway from Springfield to Starnes, distant three miles east, and in getting off was, by its sudden motion, thrown between the cars and the station platform, and seriously injured; for which this action was brought.

The negligence alleged and relied on was in failing "to stop the train . . . a sufficient length of time to allow the plaintiff safely to get off." Plea, not guilty; verdict and judgment for plaintiff for \$2,500 damages.

Starnes was a small settlement consisting of a few miners' houses about a coal shaft. The lightning express was not scheduled or advertised to stop at that station, but as there was a crossing of the Illinois Central Railroad about five hundred feet east of the platform there, that train, like all others going that way, in making the stop required for the crossing would naturally make it at or near that platform. And hence the residents, returning from Springfield and others coming from the west to Starnes,

1. Reversed in 134 Ill. 54, 2 Am. Neg. Cas. 675, on the ground of error in the entry of judgment, the Supreme Court holding that the same was against McNulta *personally*, instead of being entered against him as *receiver*.

availed themselves of that train as freely as of those scheduled to stop there, paying fare to the conductor.

Ensch was a miner at the Starnes shaft, and January 14 was pay day. As usual at such times, he, with others, had gone to the city in the afternoon to get his pay, and it was on his return that he received the injury in question. There were twenty or more other passengers for Starnes on that train, including some women and children. Ensched testified that, knowing the stop would not be long, and that so large a number were to be there discharged, he had taken his place on the rear platform of the second car, to be ahead of the crowd and get off as soon as he properly might when it should stop; that it did stop at the platform; that he thereupon first placed upon the platform a gallon jug which he had carried, and was in the act of stepping off himself when the train started up with a jerk, and so, without any fault or carelessness on his part, threw and injured him as stated.

On behalf of defendant it was claimed that the train had only slacked up when plaintiff attempted to get off; that it continued to move on some fifty or sixty yards further east; that the jerk spoken of was due to the taking off of the air-brakes, and that his injury is to be charged to his own recklessness in making the attempt while the train was in motion.

It appears that at the point referred to as further east, it did stop, and there the other passengers for Starnes were all discharged. It was not the place, however, at which that train usually stopped, nor was it so convenient or safe a place for the discharge of passengers as the platform.

Whether it did or did not stop at the place where plaintiff attempted to get off, was the only controverted question of fact, and upon its determination the case seems to have depended. Upon that question the testimony was conflicting, each side introducing quite enough, in the absence of any evidence to the contrary, to establish its own contention. For the defendant the four train hands—conductor, engineer, fireman and brakeman—testified that it did not; but some of them spoke rather from their knowledge of the usual course of that train than from any particular recollection of the circumstances on the occasion in question, to which their attention was not called until some time afterward. Three passengers for Starnes also testified to the same

effect; but their observation was made from within the coach and it was at night. Three others said they did not notice any such stop, but were not positive and did not claim to have given the matter special attention at the time. Another thought it did not really come to a standstill, but stopped long enough to have made him attempt to get off if he had been on the steps of the coach.

On the other hand, seven passengers for Starnes, including the plaintiff, testified that it there came to a full stop, though but for a moment. The position of plaintiff was the most favorable for accurate observation, and he was very positive, as were also three of the others.

To decide upon the comparative weight of this conflicting testimony was clearly within the exclusive province of the jury, who saw and heard the witnesses, both as to the direct fact and as to the corroborative circumstances, if any, on the one side and the other. In such a case, our own opinion as to the preponderance, whatever it might be, would be immaterial.

It is further claimed by appellant that the declaration is to be treated as alleging that the train did not stop at the place where the defendant undertook to discharge the passengers for Starnes a sufficient length of time to allow appellee, in the exercise of proper care and diligence, to get off safely; and inasmuch as the evidence showed abundantly and without contradiction that it did stop long enough for that purpose at another place, a little further east, where all the passengers for Starnes, excepting appellee, were in fact discharged, the declaration was not only wholly unproved, but clearly disproved, and therefore the verdict should have been set aside, notwithstanding any proof that it made a momentary stop where he attempted to get off. One of the instructions given for defendant seems to convey that idea, which the jury must have either misunderstood or disregarded. In application to this case we think it was misleading and erroneous, however sound as an abstract or general proposition. Just where defendant "undertook" to discharge the passengers they were not expressly informed in advance, nor could they otherwise know except from the actual conduct of the train. The conductor or brakeman announced the station, in the usual manner, just before it was reached, and if, following that announcement, and in about the usual time after-

ward, it actually stopped at the station platform, passengers would be justified in presuming it was for the purpose of discharging them there and in proceeding to get off; and if, in the act of getting off while it was so stopped, and with due promptness and care, the plaintiff was thrown off and injured by the starting up of the train, that presumption would be conclusive upon the defendant. He could not avoid liability for such injury by stopping the train again a few rods further on, and there giving ample time for discharging the passengers. The jury must have found that it did so stop, and in that view, the instruction was inapplicable, or so clearly improper that in disregarding it no legal wrong was done to defendant.

It is also claimed that there was no evidence tending to show that defendant was the receiver of the railroad company; and that therefore the verdict, as against him, was wholly unsupported.

The record furnishes no intimation that this point was made in the court below. This was a suit against McNulta as the "superior" for injuries alleged to have been caused by the negligence of his servants, and the defense proceeded upon the plea of not guilty, and on the sole ground that they were not, in fact, guilty of the alleged negligence. We think this should be now held to have been a concession of their relation to the defendant, as averred in the declaration—which was a fact so publicly and generally known as to bring it almost, if not quite, within the range of judicial notice.

Perceiving no material error in the record, the judgment will be affirmed.

Judgment affirmed.

SPANNAGLE V. CHICAGO & ALTON RAILROAD COMPANY.

Appellate Court, Illinois, Fourth District, February Term, 1889.

[Reported in 31 Ill. App. 460.]

PERSON ARRIVING AT STATION PLATFORM AFTER TRAIN HAD STARTED AND ATTEMPTING TO BOARD CAR WHILE IN MOTION.—In an action against a railroad company for injuries sustained while plaintiff was attempting to board one of its trains, the

trial court instructed the jury to find for the defendant, on the ground that there was no evidence to support plaintiff's claim, he not having properly placed himself in charge of the company, the latter being unaware of his intention to become a passenger, and the injury being sustained by plaintiff's attempt to board the train while in motion, having arrived on the platform after the train had started: *Held*, that there was no error in such instruction and that the judgment for defendant was proper.

IN error to the City Court of East St. Louis, St. Clair County. The facts appear in the opinion.

M. MILLARD, for plaintiff in error.

LUKE H. HITE and WILLIAM BROWN, for defendant in error, cited: Hutch. on Carr. §§ 562, 563; Brien *v.* Bennett, 8 Carr. & P. 724; Simmons *v.* C. & T. R. Co., 110 Ill. 340; Phillips *v.* Dickerson, 85 Ill. 11; C. B. & Q. R. Co. *v.* Smith, 18 Ill. App. 119; Dechert *v.* I. B. & W. R. Co., 17 Ill. App. 74; L. S. & M. S. R. Co. *v.* O'Connor, 115 Ill. 254; Bartelott *v.* Internat. Bank, 119 Ill. 259.

Phillips, J.—Plaintiff in error brought suit to recover damages for injuries received in an attempt to get aboard the train of defendant in error at Mitchell, a station on defendant's road.

The evidence shows at that station a depot was provided with a warm, lighted room, supplied with seats, for the accommodation of passengers awaiting the arrival of trains. An agent was in charge of that depot, and then present. Defendant's train, passing at the time of the injury, was not on time.

The plaintiff claims he was injured by reason of the train not remaining at the depot platform long enough to afford sufficient time for passengers to get aboard. To determine that question, the relation between plaintiff and defendant is of importance in determining the duty of the defendant. The relation between passenger and carrier is contractual. It was the duty of the plaintiff, if he desired to become a passenger on defendant's cars of that train, to become such passenger by express or implied contract. The plaintiff claims that he had left East St. Louis that evening, having purchased a round trip ticket; but that fact did not create the relation of passenger and carrier with reference to this train. No express contract being shown, before a duty rested on the defendant the plaintiff must in some manner indicate his purpose of becoming such passenger, and place himself

in charge of the carrier. He gave no notice to the agent of the company, nor did he seek the room provided for passengers to await the arrival of the train to indicate his purpose, or in any manner place himself in care of the carrier. The train arrived at the platform and one passenger, who was in the waiting room, took the train, which stopped long enough for him to get aboard. The plaintiff was at a boarding house and saloon, between two and three hundred feet from the depot, and from eighty to one hundred feet from the nearest point of the platform. When he became aware of the approach of the train he endeavored to reach the depot to take the train, and arriving at the platform after the train was in motion, endeavored to get aboard and was injured. Not having placed himself in care of the carrier, there was no relation between him and the carrier by which it became the duty of the carrier to hold its train for any length of time. For any injury he received while endeavoring to get aboard the train while in motion he must seek redress as a stranger. His act in this regard was gross negligence.

The trial court instructed the jury to find the defendant not guilty, and judgment was entered against the plaintiff for costs. Plaintiff sues out this writ of error, and insists the evidence should have been left to the jury. In *Simmons v. C. & T. R. Co.*, 110 Ill. 340, it was held: "When the whole of the evidence, if believed by the jury, is so sufficient to support a verdict in his favor that the court would not permit one to stand, it is the duty of the court to instruct the jury, as a matter of law, that there is not sufficient evidence to warrant a verdict for the plaintiff." The rule here declared has been approved by the Supreme Court in *L. S. & M. S. R.R. Co. v. O'Connor*, 115 Ill. 234; *Bartelott v. International Bank*, 119 Ill. 259.

In *Quinn v. I. C. R.R. Co.*, 51 Ill. 495, it was held: "It is urged, however, that the question should have been left to the jury. The practice adopted by the court can not be safely followed in many cases. Whenever there is evidence tending to prove the issue, the plaintiff has a right to take the verdict of a jury; but if this had gone to the jury, and they had found for the plaintiff, the court should have set aside their verdict, or, if it had refused to do so, it would have been done by this court. As no injustice has been done the plaintiff we cannot reverse the verdict."

To the same effect is *Wilson v. Williams*, 14 Wend. 148. It was said by the Appellate Court of this district, in *Taylor v. D. O. & O. R.R.*, 10 Ill. App. 311: "Where a verdict is shown by the evidence to be so clearly right that had it been otherwise the court would have set it aside, such verdict will not be disturbed merely for the reason there is error found in the instructions. In such a case it appears affirmatively that the party was not injured by such error, and hence has no right to complain. We regard a portion of defendant's instructions as being manifestly erroneous; but is the verdict so clearly right that had it been in favor of plaintiff in error we would be required to reverse and refuse to permit it to stand? If so, then this judgment should be affirmed; but if not, then it must be reversed." To the same effect in *Burling, Adm'x, v. I. C. R.R.*, 85 Ill. 18. In this case it appears from the evidence the plaintiff was not entitled to recover; the verdict was right; and even if there was error in the instruction the judgment should stand.

The other question presented is upon the admissibility of evidence offered for defense; that evidence did not and could not affect the verdict under the instruction of the court. The judgment is affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY v. DRAKE.

Appellate Court, First District, Illinois, October, 1888.

[Reported in 33 Ill. App. 114]

NEGLIGENCE OF RAILROAD COMPANY IN STARTING TRAIN WHILE PASSENGER WAS GETTING ON.—Where it appeared that a train stopped at a station about eleven o'clock on a dark and wet night, that the station house and platform were unlighted, and no conductor or brakeman took any notice whether passengers got on or off the train, and a passenger, in attempting to board the train, slipped on the steps of the car because the train started as he was in the act of getting on, and he was thrown under the wheels and injured, the railroad company was liable.

INTOXICATION OF PASSENGER IMMATERIAL IF HE EXERCISED PROPER CARE.—The conduct of the man, drunk or sober at the time, was the subject of investigation, and if his conduct was characterized by a proper degree of care and prudence, whether he made more or less effort to pursue that line of conduct was immaterial.

APPEAL from the Superior Court of Cook County. The facts are stated in the opinion.

W. C. GOUDY and W. B. KEEP, for appellant.

JAMES MCGRATH and D. P. HENDRICKS, for appellee.

Gary, J.—Except as to the sufficiency of the evidence to justify the verdict, the only question presented by the brief of the appellants is upon the refusal of this instruction :

“The jury are instructed, as a matter of law applicable to this case, that if they believe from all the evidence in the case, that the plaintiff, at the time of the injury complained of, was intoxicated, that that fact is not an excuse of his not exercising due care and prudence for his own safety, but of itself makes it incumbent upon him to exercise great care and prudence when he places himself in a place of danger.”

No argument is made or authority cited that a man intoxicated is required to exercise a greater degree of care and prudence than a sober one should do. The conduct of the man, drunk or sober, at the time of the transaction is the subject of investigation, and if that conduct is characterized by a proper degree of care and prudence, whether the man makes more or less effort to pursue that line of conduct is immaterial.

On the evidence the facts which the preponderance of it tends to prove, are, that May 5, 1885, at 10:40 P.M., a train of appellant was due, and arrived from the north at Rosehill Station, a few miles north of Chicago; the train made the usual stop, at the usual place; the platform is a very long one; the night was dark and wet; the station house was shut, and both house and platform unlighted; no conductor or brakeman took any notice whether any passenger left or took the train. The appellee had been waiting on the platform five to ten minutes for the train, and attempted to get upon it; immediately after the train started a jolt was felt, a signal to stop given, the train backed again, and then it was found that the right foot of appellant had been crushed by the train.

He testified not so explicitly on his direct examination as he did under the antagonism of the cross-examination, that after the train stopped he attempted to step upon the car step, and while he was so doing, the train started and the jerk threw him off. If this was in fact the way the accident happened, and the

appellee was exercising ordinary care in his attempt to get upon the train, the verdict is right. It was the duty of the company "to use all reasonable precaution for the safety of the traveling public." *C. & A. R.R. Co. v. Wilson*, 63 Ill. 167. Total inattention to a passenger getting on in the dark, and starting the train while, with ordinary care, he is attempting to get on, when the circumstances are such as constitute an invitation by the company to the passenger to make the attempt, make the company responsible for the consequences. There is some conflict in the testimony as to the condition of appellant as to sobriety. That matter was left to the jury under proper instruction.

A police sergeant testified that he saw the appellee attempt to get on the train, and that it was before the train stopped; that the train did not stop at the depot, but went about one hundred feet south; that it kept moving until after the accident; and then backed up one hundred feet or less. But he is so manifestly mistaken as to the movement of the train, and it is so clear that the train was stopped the second time, and backed up because of the jolt felt upon the train after it started from the first stop, that the jury were fully warranted in believing that he was mistaken also as to the movements of the appellee.

No cause is shown for reversing the judgment, and it is therefore affirmed.

CHICAGO CITY RAILWAY CO. v. DELCOURT.

Appellate Court, First District, Illinois, March, 1889.

[Reported in 33 Ill. App. 430.]

ATTEMPTING TO BOARD A STREET CAR IN RAPID MOTION IS NEGLIGENCE.—Where a person attempted to board a street car while it was moving at a rapid rate, and in consequence thereof was injured, such an act is negligence on his part, and the railway company is not liable.

APPEAL from the Circuit Court of Cook County. The facts appear in the opinion.

C. M. HARDY, for appellant.

M. W. ROBINSON, for appellee.

Garnett, P. J.—On August 17, 1886, the appellee was injured in consequence of being thrown to the ground by a cable.

car of appellant near the corner of 29th and State streets in Chicago. He brought this action against the company, charging in his declaration that he was injured by the negligence of the defendant's servants. The jury found a verdict for the plaintiff, motion for a new trial was overruled, and judgment entered on the verdict. Appellant asked for a reversal on the ground that the verdict was manifestly against the evidence. At the time of the occurrence the train of cars which caused the injury was moving north on State Street. A stop was made at the north crossing of 29th Street to receive passengers waiting there. The plaintiff claims that he was among the number waiting to take passage at that point, and that while the car was at a stand there he made an effort to board the train, taking hold of the hand-rail with his right hand and placing his right foot on the step or foot board, but that before he could raise his left foot the train started with a jerk, and after dragging him some twelve or fifteen feet, threw him violently to the ground, by means of which the injury sued for was produced. He testified that he fell because the train started too quick; that it went with a full start. The only other witness for plaintiff who pretends to have seen him fall, was George Mead, a boy about sixteen years of age, who testified that the train started at full speed, without a signal. Both of these witnesses testified that the train was composed of a grip car and two open summer cars. Mead was a newsboy, and was on the train for the purpose of selling, and was trying to sell his papers. He was not acquainted with Delcourt, and the subject was never mentioned to or by him until about a year afterward, when the plaintiff's son saw him selling newspapers and asked him whether he saw the accident. The slight attention given to the matter by Mead and the lapse of time would seem to have been sufficient to prevent his recollection of anything more than the main facts of the occurrence, yet he professes to remember the place in the block where he himself boarded the train, just what part of the middle car he first touched, the number of cars in the train, that the rear seat of the last car was unoccupied, and that the seat immediately in front of it was occupied by passengers; that he did not succeed in selling any papers on that train, that the plaintiff had a hatchet and his dinner-pail under his left arm and put his right hand and foot on the car in trying to get on; that the

windows at the front and rear ends of the car were up, and other details too numerous to recite. Much of his recollection, we think, may be accounted for by the fact (admitted by him) that he had heard the plaintiff's testimony and the opening of the case by defendant's counsel. It does not appear probable that he could, under the circumstances, have remembered the various trivial points given in his evidence. To meet the case made by these two witnesses, the defendant called the conductor and grip driver and four passengers. The two employees and two of the passengers testified that the train was composed of the grip car and one summer car only, and several of defendant's witnesses said that they did not see plaintiff among the persons waiting at 29th Street when the car stopped or started. The driver of the grip did not see Delcourt until after he fell, but all the other five witnesses for defendant state, that after the train started and was under full speed, he ran alongside the train and tried to get on the grip, and in making the effort was thrown to the ground. Some of these witnesses say that the plaintiff came on a run from the sidewalk, in a southwesterly direction, in order to catch the train, which had already started north before he made any move toward it. Four of the defendant's witnesses, who are wholly disinterested, were seated in the car next to or near the grip, so as to see clearly all that took place, and there is nothing in their evidence to indicate bias or insincerity. Appellee argues that his identification by the defendant's witnesses is not satisfactory, and the accident to which they testify must have been at some other time and to some other person. It is true that some of the witnesses would not swear positively that Delcourt was the man they saw fall, but the time and place given, with other details, leave no reasonable doubt on the point. This is not the ordinary case of proving the defendant not guilty by the employees of the company only, against whose evidence it is commonly urged that their employment and daily bread depend upon the will of an autocratic employer. Juries are in the habit of taking a wide range of liberty in scanning and disbelieving the evidence of such witnesses, but here are four men who have no motive to tell other than the truth, who had ample opportunity of observation, and whose evidence bears internal evidence of fairness and honesty. Such evidence the jury should not lightly put aside, and we think would

not, unless misled by passion or prejudice. Trying to board the train when in rapid motion was negligence on the part of the plaintiff, and on the entire evidence no negligence is attributed to appellant. It is with great reluctance that this court interferes with the findings by a jury, but as the case has only been tried once, and the verdict appears clearly against the weight of the evidence, we think justice requires it should be submitted to another jury.

The judgment is reversed and the cause remanded.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO RAILROAD CO. v. DUFRAIN.

Appellate Court, Illinois, Second District, December Term, 1889.

[Reported in 36 Ill. App. 352.]

THROWN FROM TRAIN BY SUDDEN STARTING AND JERK—INSTRUCTION AS TO ALIGHTING, ERROR.—Where the declaration alleges that plaintiff was *thrown* from the train by its starting suddenly and with a jerk, an instruction that if plaintiff used reasonable diligence and care in *alighting* from the train, then she might recover, is erroneous.

ALIGHTING FROM MOVING TRAIN—NEGLIGENCE *PER SE*—INSTRUCTION.—Where a passenger, while alighting from a train, was injured by the alleged negligence of the railroad company in starting the train suddenly and with a jerk, an instruction asked for by the defendant company to the effect that jumping off a moving train is negligence *per se*, should have been given.

APPEAL from the Circuit Court of Kankakee County. The facts appear in the opinion.

THOS. P. BONFIELD, for appellant, cited: Dougherty *v.* C. B. & Q. R.R., 86 Ill. 467; Shear. & Redf. on Neg. 341; Jeffersonville R.R. Co. *v.* Swift, 22 Ind. 450; Penn. R.R. *v.* Chappel, 23 Pa. St. 147; O. & M. R.R. *v.* Stratton, 78 Ill. 88; Ill. Cent. R.R. *v.* Slatton, 54 Ill. 133; C. & A. R.R. *v.* Randolph, 53 Ill. 510; Ill. Cent. *v.* Chambers, 71 Ill. 519; O. & M. R.R. *v.* Schiebe, 44 Ill. 460; I. C. R.R. *v.* Baches, 55 Ill. 379; I. C. R.R. *v.* Hammer, 72 Ill. 352; I. C. R.R. *v.* Hetherington, 83 Ill. 510; C. B. & Q. R.R. *v.* Lee, 68 Ill. 576; I. C. R.R. *v.* Godfrey, 71 Ill. 500.

B. F. GRAY and H. K. WHEELER, for appellee.

Upton, P. J.—On the 9th of July, 1888, in the early morning, appellee, her husband, son and daughter, took passage on a passenger train running upon appellant's railway, at Fowler, Indiana, for transportation to Strawn, in Illinois. The train in which they took passage arrived at St. Anne at 4:20 A. M. of the same day. The appellee, in alighting from the train, was injured by a fall, and brings this suit to recover damages from appellant for that injury, laying her damages at \$1,999.

The declaration filed in the case contains two counts, the first of which, after charging appellant with possessing and operating a railroad, alleges that appellee took passage in the cars running upon the railway of appellant, as above stated, paying the fare of appellee therefor. That upon the arrival of the train at St. Anne, appellant did not give appellee sufficient time to alight from the train, and in attempting to alight therefrom, she was thrown off the train and injured, while she was exercising due care in that regard.

The second or additional count charged that appellee took passage in appellant's passenger cars, at and to be transported to the points above stated, and that appellant did not allow appellee sufficient time to alight from the car in which she was transported, and because thereof she was hurt and received permanent injuries, etc.

To both counts the plea of not guilty was interposed. In the trial court the case was heard with a jury, who found the appellant guilty, and assessed appellee's damages at \$1,999, the amount she claimed in her declaration, upon which verdict, after overruling a motion for a new trial, the court entered judgment, to which appellant excepted and appealed to this court. The record on that appeal is now before us. The controverted facts are in narrow compass.

By the declaration it is claimed that appellee was injured by reason of the negligent act of appellant's agents and servants in starting the train suddenly, and with a "jerk," as she was attempting to alight therefrom, using due care, by means whereof she was thrown off the passenger car to the depot platform, and thereby sustained the injuries complained of; and that her injury was occasioned by appellant's servants in not stopping its passenger train, upon which she was a passenger, at the point of her

destination, for a sufficient length of time to let off passengers with safety, as required by law.

Both positions, as above stated, were sharply contested on both sides.

The defense, in part, was based upon the theory and allegation that after the train had started from the depot at St. Anne, and had gone some eighty feet, and while the train was in motion, the appellee voluntarily attempted to alight from the train, and in so doing was injured, and that such conduct in attempting to get off the train, while in motion, was negligence *per se*, sufficient to defeat recovery, and cited *Dougherty v. C. B. & Q. R'y Co.*, 86 Ill. 467, and cases cited; *O. & Min. R'y Co. v. Stratton*, 78 Ill. 94, and cases cited, with many other adjudicated cases in this State and elsewhere, which seem to fully sustain the doctrine contended for. The appellee's fourth given instruction, as shown by the amended record in appellee's briefs, tells the jury that if the appellee used reasonable diligence and ordinary care in alighting from the train, then she might recover, etc. This instruction was erroneous, for the reason, first, the charge in the declaration is, as we have seen, that she was thrown from the train; second, even if she used all the care she could in the act of alighting from the train, it was negligence in her to attempt to alight at all when the train was in motion, however carefully she might attempt it. This instruction took away from the jury one of the main questions in the defense and allowed a recovery for a cause not alleged in the declaration. *C. B. & Q. R'y Co. v. Mehlsack*, 131 Ill. 61.

The instructions asked by the appellant in regard to its being negligence to jump off the moving train might properly have been given, as such act would defeat the cause of action stated in the declaration, to the extent, at least, of the averment that appellee was thrown off the car by a sudden jerking as averred. One instruction to that effect was in substance given; of this, however, it may not be important to make further comment, for, strictly speaking, it is a question of fact for the jury, although the Supreme Court say in the above cited case, *that* is a still controverted question.

We do not wish to be misunderstood as asserting that if, after appellee had gotten out upon the platform of the car in which she was being transported, in a proper and timely endeavor to alight

therefrom, and by the motion of the car or train she was forced to jump off, the act under such circumstances would be negligence on her part to prevent a recovery for injuries sustained through negligence of the servants and agents of the appellant in causing her to jump off; in such case the act would not be voluntary and would be excusable.

In regard to the other refused or modified instructions we perceive no reversible error.

We need not notice the point made on the special findings, as the case will be submitted to another jury.

It was entirely proper, and in some part the court did allow appellant to show that the train was stopped a sufficient length of time to allow all the passengers using reasonable diligence to alight therefrom before starting again, as that was one of the principal issues in the case; full inquiry in regard thereto should have been allowed by the trial court.

For the reasons above assigned the judgment of the court below is reversed and the cause remanded for further proceedings not inconsistent with the views above expressed.

Reversed and remanded.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY V. JOHNSON.

Appellate Court, First District, Illinois, October, 1891.

[Reported in 44 Ill. App. 56.]

RAILWAY COMPANY NOT LIABLE FOR INJURY TO PASSENGER

FOR FAILING TO STOP AT CROSSING.—A railway company that failed to stop its train at a railroad crossing, as required by a police regulation, is not liable for injuries to a passenger who attempted to alight at the crossing when the train slowed up and was thrown off the step by a sudden jerk of the train as it increased its speed, the company not being notified that the sudden jerk would subject the passenger to peril.

NEGLIGENCE TO GET ON OR OFF MOVING TRAIN.—Getting on or off a train of cars in motion is such negligence as will preclude a recovery for an injury received.

CROSSING NOT TO BE CONSIDERED STATION BECAUSE PASSENGERS SOMETIMES ALIGHTED THERE.—Evidence that passengers sometimes got off the trains when they stopped at the crossing, but without direction of the company's agents, is not sufficient to bind the company to manage its trains at the crossing as at a station.

APPEAL from the Superior Court of Cook County. The facts appear in the opinion.

GEORGE W. KRETZINGER, for appellant.

JOHN C. BLACK and WILLETT & JOHNSON, for appellee.

Moran, J.—Appellee brought this action to recover for an injury received by him while getting off one of defendant's trains. The evidence shows that appellee and his cousin and cousin's son, who were all returning from work in Chicago to their homes in Englewood, got on the train at Archer avenue and took seats near together in the car. When the conductor came for the tickets appellee's cousin told him that he wanted to get off at the railroad crossing at 58th street, and the conductor said it was not a station, but they stopped for the crossing. Appellee heard this conversation but said nothing to the conductor about getting off himself. When the train approached the railroad crossing appellee went out on the platform on the east side thereof, his cousin being on the west side, and what then occurred appellee relates as follows:

"As the train neared the crossing it slowed up until it was running, I presume, about as fast as a man could walk ordinarily, and I stepped down on the step and took hold of the rail of the coach with my right hand, and the rail in front with my left hand, and having a little small basket on my right arm that I carry my lunch in, and just as I swung off, the train gave a kind of a jerk and turned me around and threw me. After that I didn't remember anything about it, only that I knew I was under the train and they picked me up."

Q. "You got off while the train was in motion?" A. "Yes, sir." Q. "The train hadn't come to a stop?" A. "No, sir; it didn't come to a standstill."

Appellee's arm was crushed by the cars running over it and he was otherwise injured. Other witnesses make the speed of the train greater at the point where appellee got off than he does, and all agree that the train did not come to a stop, but that it slackened speed as it came to the crossing and then increased it suddenly. The jury found a verdict in favor of appellee.

It is contended that as the law of the State required the train to be brought to a full stop when approaching the crossing of another railroad, the failure to come to a full stop, or the sudden

increasing of the speed of the train, was such an act as made the question to be tried by the jury one of comparative negligence. We do not perceive how such failure to stop, or such sudden increase of speed, can be held to be negligence by the appellant in the discharge of its duties toward appellee under the facts as disclosed in this record. He did not notify the conductor that he intended to depart from the train at that point, and the appellant did not undertake to allow him an opportunity to do so. While appellant might be bound to obey the police regulation requiring it to stop at the crossing under the penalty prescribed by the statute, it was under no duty to appellee, growing out of its contract with him as a passenger, to stop the train at said crossing. Refusing to stop, or a failure to slacken speed at that point, was no breach of its agreement with appellee, or of any duty arising therefrom. Having slackened speed, it was under no duty not to increase speed suddenly or by a sudden jerk, it being without notice that appellee had placed himself in a position where such a sudden jerk would subject him to peril. Appellant being under no duty to appellee *quoad* the time and circumstances of the accident, it follows that appellant could be guilty of no negligence toward him in managing its train as shown by the evidence. *Ohio & Miss. R'y Co. v. Stratton*, 78 Ill. 88.

There is then upon this record no question of comparative negligence, for that question can arise only when both parties are guilty of negligence which contributes to the injury. It has been many times decided that getting off or on a train of cars in motion is such negligence as will preclude a recovery for an injury received. *C. R. I. & P. Ry. Co. v. Eininger*, 114 Ill. 79; *Chicago & N. W. R'y Co. v. Scates*, 90 Ill. 586; *Lecor v. Toledo, Peoria & W. R.R. Co.*, 10 Fed. Rep. 15; *Hunter v. Cooperstown & S. V. R.R. Co.*, 126 N. Y. 18.

In *C. B. & Q. R.R. Co. v. Hazzard*, 26 Ill. 373, the Supreme Court characterizes the getting off a train while in motion as a careless and imprudent act, for which the one who does it, and not the railroad company, should suffer the consequences. If, then, there was some negligence on the part of the appellant, there could be no recovery in this case, because getting off a train while in motion is a lack of ordinary care, and in order that the plaintiff may recover there must not only be fault on the

part of the defendant, but ordinary care on the part of the plaintiff must be shown; and so it is well settled that the rule of comparative negligence has no application and cannot be properly invoked, except in cases where the party injured observed ordinary care for his own safety with reference to the particular circumstances involved. *Garfield Manuf. Co. v. McLean*, 18 Ill. App. 447; *C. B. & Q. R.R. Co. v. Johnson*, 103 Ill. 512.

It may be true, as implied in appellee's brief, that a railroad company may so conduct itself by the course of its business as to assume the same duties to passengers who discharge themselves from its trains at a railroad crossing as it owes to them at a regular station. Where the company treated the crossing as a point for receiving and discharging passengers its obligations to a passenger would doubtless be the same as at a regular station. That is, the conduct of the company would have the effect of making the crossing a station. *Lake Shore & M. S. R'y Co. v. Ward*, 25 Ill. App. 423.

But showing that at some time, or at different times, passengers upon the trains had taken advantage of the stop at the crossing to leave the train, without the direction or supervision of the company's agents, would not be sufficient to bind the company to conduct and manage its trains at the crossing as at a station. We find no evidence in this case sufficient to warrant the conclusion that the appellant company was in the habit of discharging or receiving passengers at this crossing. The motion to strike out the bill of exceptions, which was reserved to the hearing, is overruled.

The judgment must be reversed and the case remanded.

ILLINOIS CENTRAL RAILROAD CO. v. TAYLOR.

Appellate Court, Third District, Illinois, November Term, 1891.

[Reported in 46 Ill. App 141.]

TRAIN MUST BE STOPPED A REASONABLE LENGTH OF TIME TO ALLOW PASSENGERS TO ALIGHT.—Carriers of passengers must allow a reasonable time to passengers to alight from their cars, and where a train is started too quickly to allow persons to get off safely, and a person is injured while attempting to alight, the carrier will be liable.

APPEAL from the Circuit Court of Champaign County. The facts appear in the opinion.

J. S. WOLFE, for appellant.

THOMAS J. SMITH, for appellee.

Wall, J.—The appellee recovered a judgment for \$800 for injuries sustained in getting off the train of appellant. It is shown with sufficient certainty that she was so injured, and it is not complained that the damages awarded are excessive.

The plaintiff and her husband entered the train at Bondville to go to Champaign. At the latter point there are two stations where the train stops and where passengers may get off, one at the junction with the I. B. & W. known as the Big Four Depot, and the other in front of the Doane House, about half a mile further on. The plaintiff wished to alight at the first station, and when the train stopped there, she and her husband got up to go out. He was in advance and had stepped off the car, and she was on the lower step and about to alight, when the train suddenly started forward, and she, in attempting to thus get off, was thrown down and received the injury complained of. This is the statement given by herself and husband, and, as they say, they started to leave the car as soon as it stopped. They were seated near the door and were not detained by other passengers being in their way. They are corroborated by the witnesses Ruel and Stell as to promptness in their action in starting out. It appears from the testimony of these witnesses that they and other passengers who were intending to get out there had not time to do so and waited until the train stopped again a short distance beyond the station platform, where they then alighted. The conductor corroborates this by his testimony, for he found it necessary to make a second stop (after he had signaled to start) in order to let off those other passengers. The conductor says the first stop was two or three minutes in duration. The plaintiff and her husband say it might have been a minute and a half or two minutes; and there is expert testimony to show that from one to two minutes was long enough. If the plaintiff and her husband were as prompt as they say they were and as other witnesses say they were, it is probable the stop was considerably less than one minute. It is a matter of frequent observation that very few persons realize how long a minute is when the term is used in reference to a transaction like that of

getting on or off a train. Most witnesses have a very inaccurate idea in that respect, and their testimony is to be judged by what actually occurred rather than by their estimate of the time occupied. The fact that a number of other persons who were intending to get off were unable to reach even the car platform, is a very persuasive circumstance in support of the claim that the stop was unreasonably short. That they were so unable and that the train had to be stopped the second time for their accommodation, makes it quite probable that the plaintiff was prompt enough, and that it would have been fortunate if she had been less so. She was a large, fleshy person, about sixty-four years of age, and appears to have been quite timid. She asked her husband to take her hand, as she was afraid of falling. It is difficult to understand from the evidence whether this fear was aroused before the train started or not. He did take her hand, or perhaps both hands, and it is claimed that in this there was negligence on her part as well as his, and that in a general way she was negligent in attempting to alight after the train moved forward. We think it is not clear that after the train moved she made the effort to step off, but it is reasonably clear that she was at least about to step off when it started. We cannot agree with counsel that in the use of ordinary care she would necessarily have stayed where she was and waited for another stop. Her position was not free from peril, in view of her age and physical condition, and was one calculated to excite apprehension in persons of more experience. It cannot be said that if the train started before she actually made the step, but when she was about to do so, she was wanting in ordinary care. She did what most persons would have done under the circumstances.

After carefully reading the evidence, we are impressed with the view that there is enough in it to justify the jury in concluding that the plaintiff was prompt enough in moving out of the car, that the stop was unreasonably brief, and that the conductor was not sufficiently careful in ascertaining whether all the passengers were out. He admits that he saw these other passengers standing in the aisle, but supposed they were intending to get off at the other station. The train was behind time, and this may have occasioned unusual haste on his part in giving the signal to start. We think the case is very unlike a number of cases cited by

counsel for appellant, and that there is very little room for disagreeing with the conclusion reached by the jury, if they gave credit to the statement of facts as contained in the testimony offered on behalf of the plaintiff. The conflict in the evidence produced by the testimony offered by defendant was mainly, if not entirely, when properly weighed, as to the length of the stop, and this depended chiefly upon the estimates of witnesses rather than upon what occurred.

As to instructions, we think no substantial error appears. The defendant obtained very full and pointed instructions on all the material features of the case, and the modifications complained of, even if unnecessary, could not have misled the jury. The instructions given for plaintiff are not fairly subject to criticism in any important respect.

On the whole, we think the jury were advised as to the law with sufficient clearness and accuracy.

The judgment will be affirmed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. KOEHLER, BY NEXT FRIEND.

Appellate Court, Illinois, Second District, December Term, 1892.

[Reported in 47 Ill. App. 147.]

INJURED WHILE BOARDING A MOVING FREIGHT TRAIN AT DIRECTION OF TICKET AGENT—RAILROAD COMPANY NOT LIABLE.—Where a person attempted to board a moving freight train on the alleged direction of the ticket agent, and was injured in the attempt, and the evidence showed that the freight train was one that did not carry passengers, and that the ticket agent had no authority to direct persons to board trains, the railroad company is not liable.

NEGLIGENCE IN ATTEMPTING TO BOARD A MOVING TRAIN.—

In such case it was *held*, that it was negligence on the part of plaintiff to attempt to board a train while it was in motion, although advised to do so by a ticket agent.

APPEAL from the Circuit Court of La Salle County. The facts appear in the opinion.

THOMAS S. WRIGHT, ROBERT MATHER and G. S. & E. ELDRIDGE, for appellant.

M. T. MOLONEY, for appellee.

Cartwright, J.—Alban Koehler, a young man eighteen years old, received an injury to his foot while he was attempting to get on a moving freight train of the Chicago, Rock Island & Pacific R'y Co., and brought this suit by his next friend to recover damages for such injury. The declaration averred the purchase of a ticket by the plaintiff and his intention to become a passenger, and charged that defendant failed and refused to stop its freight train at the depot, but kept it in motion; and that an agent, who was alleged to have been then and there the ticket agent of defendant, directed and ordered plaintiff to jump on and get aboard of said moving train, which he attempted, because of such direction and order, and was injured. It was charged that defendant was guilty of negligence in not stopping the train, and in the direction and order given by the ticket agent, and it was averred that plaintiff was in the exercise of ordinary care. There was a trial resulting in a verdict for plaintiff for \$2,700, from which \$1,000 was remitted; and the court, after overruling a motion for a new trial, entered judgment for \$1,700.

With respect to the charge of negligence in not stopping the train, it will be observed that the injury and damage alleged in the declaration did not result from the act of failing or refusing to stop the train as a proximate cause of such damage. If there was a wrongful failure and refusal to stop the train, a party injured thereby might recover all such damage as he might suffer by reason of that act by which he would be prevented from taking passage on that train. No such damage was alleged, but it was averred that plaintiff attempted to get on the moving train by reason of an order and direction of the ticket agent, and the injury resulted from such attempt being made while the train was in motion. The only act which could connect the defendant with the injury as an efficient cause of it was the alleged order and direction of the ticket agent.

Whether such an order and direction was given was in dispute at the trial, but inasmuch as the jury found for plaintiff, the fact that it was given may be regarded as settled by the verdict. Plaintiff's version of what occurred on the occasion may therefore be taken as true. He testified that he went to the station with a companion on the morning of June 6, 1889, intending to go to Depue to load ice into barges; that they found Frank Haas there

attending to the station work and bought tickets of him and asked him whether or not a freight train would stop there on which they could ride to Depue; that Haas said that the train would be there soon, and further said, "If she don't stop we will make her stop;" that when the train was approaching, Haas said, "The way it looks she won't stop;" that plaintiff said, "I don't believe she will stop," and Haas again said, "If she don't stop we will make her stop," and held up two fingers toward the approaching train; that Haas then said, "I don't believe that she will stop," and told one of the boys to go east and another west, and jump; that Haas asked for plaintiff's bundle, and took it to throw to him when he should get on; and that plaintiff made the attempt and caught hold of the railings at the front steps of the caboose, but slipped and fell under the car and was hurt. The evidence was that Haas was selling tickets and doing the ordinary work of an agent about the station, and that the freight train was one that did not carry passengers.

Assuming that Haas told the boys to separate along the platform and jump on the train, and that such direction was negligently given, it would be necessary, in order to fix liability upon defendant, that such direction should be within the real or apparent scope of the authority of Haas, as agent. The order must have been given under authority of the company, either expressly conferred upon Haas or fairly implied from the nature of his employment, and the duties incident to such employment. There is no claim, and can be none, that the company had in fact authorized Haas to give such an order, or to act in a matter of that kind at all. The act directed was expressly prohibited by the company by a notice posted in plain view of all the parties who were present. It must, therefore, be shown to be an act done in the performance of a service which the public would have a right, from the nature and circumstances of the employment, to infer that the company had employed him to perform. *C. B. & Q. R.R. Co. v. Casey*, 9 Ill. App. 632; *C. & A. R.R. Co. v. Michie*, 83 Ill. 427; *C. M. & St. P. R'y Co. v. West*, 125 Ill. 322; *Cooley on Torts*, 535.

It is a matter of common observation that agents and employees at railroad stations do not take part in the work of putting passengers upon trains. In their relation with the public they sell

tickets, check and handle baggage, putting it on and taking it off from trains, furnish information concerning trains and rates of fare and freight, signal trains which stop only by signal for passengers and perform other like services; but they are not found helping passengers on or off from trains or giving orders on those subjects. The care of the public in their relation as passengers to trains running upon railroads are not committed to station agents, but to those who control and operate the trains. Any assistance or direction in getting upon trains comes from brakemen or other employees in the train service. Acts in that department of the passenger service are not within the apparent scope of the powers of a station agent. The duties usually performed by agents of the same class as Haas do not authorize any inference on the part of the public that they are authorized to give directions to passengers in getting on or off cars. The evidence, therefore, failed to fix any liability upon defendant for the act of Haas. In this instance a notice had been posted which was designed to prevent persons from getting on cars while in motion, and which would show that the agent had no authority to authorize it. The notice was on the side of the depot, in the form of a sign fourteen inches long and about ten inches wide, which read: "Chicago, Rock Island and Pacific Railway. Notice: Getting on and off trains while in motion is always dangerous, and is prohibited under all circumstances. E. St. John, Manager." Plaintiff was around that place for some time before the train arrived and he testified that he might have seen the notice, but could not tell whether he did or not and paid no attention to it. Whether he saw the notice or not it was negligent in him to attempt an act so obviously dangerous as attempting to get upon the moving train, although he was advised to do so by Haas. There was no right of control or direction on the part of Haas, and plaintiff owed no duty of obedience to his directions. He was left at perfect liberty to refuse to obey the direction without any evil consequences to himself resulting from disobedience. There was no compulsion and no force used or threatened, and it is not claimed that plaintiff was not old enough to know better than to make the attempt. He had arrived at years of discretion and was responsible for his own acts. A person of ordinary prudence under like circumstances, when there was no exigency

or compulsion or anything to prevent the use of discretion, would not have attempted to get on the moving train. The act was also prohibited by a statute, of which he is presumed to have had knowledge. Rev. Stat., chap. 114, p. 79.

The first instruction for plaintiff is objected to. It appears to be according to the formula prescribed for an instruction on the rule of comparative negligence, as we understand it, but it has the following addition: "Ordinary care is such as reasonably prudent persons would generally take under like circumstances, and want of such care would not be slight negligence on the part of plaintiff." This was the only attempt made in the instructions to define ordinary care or negligence, and on the subject of negligence it was not correct. Plaintiff could not recover for any injury occasioned by negligence merely which would have been avoided by the exercise of ordinary care on his part. *Abend v. T. H. & I. R.R. Co.*, 111 Ill. 202.

It is held that a plaintiff who is in the exercise of ordinary care may be guilty of slight negligence, but a want of ordinary care on his part would constitute such negligence as would preclude a recovery. If plaintiff fell below the standard of ordinary care, his negligence must necessarily be of a higher degree and embrace slight negligence, because ordinary care does not exclude the idea of slight negligence, and if he exercised ordinary care he observed all the care the law required of him, and was not guilty of any negligence that would bar a recovery. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358.

The evidence failed to establish negligence on the part of appellant, or ordinary care on the part of appellee, but proved that the injury to appellee was due to his own negligence.

The judgment will be reversed. (1)

1. The following finding of facts was directed to be incorporated in the judgment: "We find that the defendant, the Chicago, Rock Island & Pacific Railway Company, was not guilty of any or either of the acts of negligence alleged in the declaration; that the plaintiff, Alban Koehler, was guilty of negligence which caused

the injury and damage in said declaration mentioned; that said Alban Koehler was not at the time of such injury in the exercise of ordinary care for his safety, and that there is no evidence tending to prove that said defendant was guilty of any or either of said acts of negligence charged in said declaration."

**NORTH CHICAGO STREET RAILROAD CO. v.
WRIXON. (1)***Appellate Court, First District, Illinois, October, 1893.*

[Reported in 51 Ill. App. 307.]

RAILROAD COMPANY NOT LIABLE FOR DEATH OF BOY JUMPING FROM STREET CAR IN MOTION.—In an action for the death of a passenger, where it appeared that the deceased, a boy about ten years of age, while riding on a street car, told the conductor that he wanted to get off at the next street corner, and as the car did not stop he jumped, swung or stepped off and slipped and fell under the car, which passed over his leg and he received injuries from which he died, the railroad company was held not to be liable and a verdict for five thousand dollars was considered excessive.

On the 17th day of August, 1890, William Wrixon, a boy about ten years of age, was a passenger on one of appellant's cars. The car was proceeding southward on Evanston Avenue. Just after it arrived at the Addison Avenue crossing, the deceased said to the conductor, "I want to get off at the church." When the car was between Addison Avenue and Gary Place, the deceased said, "Let me off at the church." The church was about seventy-five feet south of Addison Avenue. The car did not stop and the deceased jumped, swung or stepped off; in so doing he slipped and fell so that the car passed over his leg, inflicting injuries from which he died.

Suit being brought by an administrator appointed, the jury returned a verdict for the plaintiff of \$5,000, and there was judgment for that sum.

ARNOLD HEAP and ROSENTHAL & HIRSCHL, for appellee, cited: *Crissey v. Hestonville R'y Co.*, 25 P. F. Smith, 83; *R.R. Co. v. Hazzard*, 75 Pa. St. 367; *Oldfield v. N. Y. & H. R. R.R. Co.*, 14 N. Y. 310; 3 E. D. Smith, 71; *Lake Shore v. Johnson*, 135 Ill. 641; *City v. Keefe*, 114 Ill. 222; *Quincy, etc. v. Cruse*, 38 Ill. App. 212; *N. C. S. R. Co. v. Williams (Ill.)* 29 N. E. Rep. 672; *C. & A. R.R. v. Fisher (Ill.)* 31 N. E. Rep. 406; *R.R. Co. v. Gladmon*, 15 Wall. 401; *R.R. Co. v. Stout*, 17 Wall. 657; *City v. Keefe*, 114 Ill. 222; *Joliet v. Verley*, 35 Ill. 58; *Lacon*

1. Affirmed in 150 Ill. 532, 2 Am. Neg. Cas. 708.

v. Pace, 48 Ill. 499; *Joliet v. Shufelt* (Ill.) 32 N. E. 969; *Harkins v. P. P. C. C.*, 52 Fed. Rep. 724; *Houghkirk v. Pres. etc.*, 92 N. Y. 219; *Chicago, etc. v. Wilson*, 35 Ill. App. 346; *Ill. C. R'y Co. v. Barron*, 5 Wall. 90; *B. & O. v. Kelly*, 24 Md. 271; *Bierbauer v. N. Y. Cent.*, 15 Hun, 559; *aff'd* 77 N. Y. 588.

EGBERT JAMIESON and EDMUND FURTHMANN, for appellant, cited: *Ill. C. R.R. Co. v. Weldon*, 52 Ill. 290; *City v. Scholten*, 75 Ill. 469; *C. & A. R.R. Co. v. Becker*, 76 Ill. 25; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *R. R. I. & St. L. R.R. Co. v. Delaney*, 82 Ill. 198; *C. & A. R.R. Co. v. Becker*, 84 Ill. 483; *Andrews v. Boedecker*, 17 Ill. App. 218; *C. E. & L. S. Co. v. Adamick*, 33 Ill. App. 414.

Waterman, J.—Two acts of negligence are charged in the declaration, viz.: that defendant's driver failed to stop its cars, as requested, at the intersection of Addison Street and Evanston Avenue; and that the deceased, while with due care and diligence endeavoring to alight from the car, was thrown to the ground and injured by reason of the negligence of appellant in failing to properly equip its cars with safety guards and appliances.

As to the alleged negligence in failing to stop its car when requested, the court is unitedly of the opinion no recovery can be had in this case. For whatever damage a passenger may sustain from a failure to stop a street car at a proper place when properly requested, such failure being the proximate cause of the injury, a recovery might be had. In the present case, between the negligence of the driver and the injury to plaintiff's intestate, there intervened another cause, without which the accident would not have happened; that intervening cause was the act of the deceased in jumping from the car while it was in motion.

The train of events, from the failure to stop the car to the accident, was not a natural or necessary sequence from the act of the driver in not stopping his car.

Nor was the jumping from the car, so far as is shown by the evidence, a thing which the defendant can be presumed to have known would follow the failure to stop.

The breach of duty upon which an action for injury can be maintained must be the proximate cause of the damage to the plaintiff. *I. B. & W. R'y Co. v. Birney*, 71 Ill. 392; *Shear. & Redf. on Neg. §§ 8, 25 and 26*; *Schefer v. R'y Co.*, 105 U. S.

249; *Kirtner v. Indianapolis*, 100 Ind. 210; *Phila. R. Co. v. Boyer*, 97 Penn. St. 91.

The maxim applicable in such cases is "*In jure non remota causa, sed proxima spectatur.*" In law the immediate, not the remote, cause of any event is regarded. As to the alleged negligence in not having upon the car proper guards, the defendant, being a common carrier, is bound to exercise the highest diligence for the safety of its passengers, while riding, getting on and getting off its cars. In the providing of appliances for the safety of passengers, it is bound to make use of such well-known and approved means as are reasonably consistent with its condition, the business it is doing, and its duty to the public. *Smith v. N. Y. & H. R'y Co.*, 19 N. Y. 127; *Hegeman v. West. R'y Cor.*, 3 Ker. 9; *Hutch. on Carr.* § 529; *Toledo, etc. R.R. Co. v. Conroy*, 68 Ill. 560.

The Supreme Court of this State, in *North Chic. St. R'y Co. v. Williams*, 29 N. E. 672, held that whether a plaintiff, in getting upon a horse car while it is in motion, is or is not in the exercise of due care, is a matter for the determination of the jury under all the circumstances of the case. Such being the rule—whether the deceased was in the exercise of ordinary care in getting off the car while it was in motion, and whether there were well-known and approved appliances (guards) which, if in use, would have prevented the injury to the plaintiff, and whether the use of such guards was reasonably consistent with the condition of appellant, the business it was doing and its duty to the public, were all questions to be submitted under proper pleadings and instructions to the jury.

It is the duty of a common carrier to be diligent in providing for the safety of its passengers, and it is *prima facie* liable for injuries happening to them on account of any negligence by it; they being at the time of such injury in the exercise of ordinary care and in observance of its rules. If, then, it be not negligence for a passenger to get off a moving street car, and not a violation of its rules, it is the duty of the carrier to be diligent in so equipping its cars that he may not be injured in so alighting. The amount of the verdict and judgment in this case cannot be justified. The defendant is liable only for the pecuniary loss sustained by the next of kin. Neither five nor fifty thousand dollars would

be an adequate compensation for the pain and anguish of the parents of this boy; with this we have nothing to do. While it is the rule in this State that in this class of cases the jury may give damages without evidence as to pecuniary loss sustained, yet it is not the case that the conclusion of the jury in this regard is beyond review. We cannot say, and we do not think, that the jury thought that the pecuniary loss alone to the next of kin of deceased was five thousand dollars. It is doubtful if, in one case in a thousand, the bare pecuniary loss suffered by the next of kin from the death of a boy of ten years, is five thousand dollars; in very many instances like this, while there is the keenest anguish, there is no pecuniary loss whatever. In no such case as this has a judgment of this magnitude been sustained by the Supreme Court. The judgment of the Circuit Court is reversed and the cause remanded.

Gary, J.—I agree to the reversal of the judgment, but not for the reason assigned in the foregoing opinion. Notwithstanding the decision of this court in *Adamick v. Chicago, E. & L. S. R'y*, 33 Ill. App. 412, and the authorities there cited, and my own apparent assent thereto in *Chic. M. & St. P. R'y v. Wilson*, 35 Ill. App. 346, I yet believe that the legislation of this State commits to the uncontrollable caprice of the jury the amount of damages, not exceeding \$5,000. It is all guesswork: *R.R. Co. v. Barron*, 5 Wallace (S. C.) 90; and what is there said about "good sense and sound judgment," only gives a respectful name to the disposition of juries to make railroads smart.

Negligence is the omission to discharge some duty, whenever the negligence consists in omission. No duty, no negligence.

Duty is an inference of law. I undertake to say that no declaration can be drawn which will show a duty of a street railway company to adopt precautions for the safety of passengers who jump, with or without notice, from a car, without any express or implied assent of the railway company, while the car is moving in the ordinary course of its journey. Probably the next case where such a passenger has been bruised by the guard that a railway may have adopted, will be put upon the claim that he was outside the rail, so that a wheel would not have touched him, but the projecting and improper guard was the cause of his hurts.

I think the cause should be remanded, accompanied by an

opinion that will prevent any holding, on another trial, that it was the duty of the appellant to take care of the deceased when he jumped off.

Shepard, P. J.—I think the judgment ought to be affirmed. Judgment reversed.

THE NORTH CHICAGO STREET RAILROAD COMPANY v. ELDRIDGE. (1)

Appellate Court, Illinois, First District, October Term, 1893.

[Reported in 51 Ill. App. 430.]

EXCESSIVE DAMAGES—WHEN JUDGMENT WILL BE DISTURBED.

—Judgments in cases for injuries will not be disturbed on the ground that the damages are excessive, unless it is manifest that the verdict is against the evidence and is to be attributed to passion or prejudice on the part of the jury.

DAMAGES FOR \$10,000 NOT EXCESSIVE FOR INJURY TO PERSON WHILE ALIGHTING FROM STREET CAR.—

Where plaintiff was in the act of alighting from a car while it was standing still and the bottom of her dress caught upon a bolt that protruded above the floor of the car and caused her to trip or stumble, or both, and fall to the ground, inflicting severe injuries upon her, thereby rendering her unable to do anything in her business as a stenographer, in which, for a year or more before the accident, she had earned an average of \$75 to \$80 a month, it was held that a judgment for \$10,000 damages was not excessive. (2)

FROM the Circuit Court of Cook County. Declaration in case; plea, not guilty; trial by jury; verdict for plaintiff, \$13,500; remittitur, \$3,500; judgment for \$10,000, from which defendant appealed. The facts appear in the opinion.

KEEP & LOWDEN, for appellant.

JOHN F. WATERS, for appellee.

Shepard, J.—The appellee was a passenger on the car of the appellant. The car was an open one, with seats running crossways, and was boarded and alighted from on the sides, at the end of the seats, by stepping on a foot-board suspended by iron bolts from the floor of the car, and running its entire length.

1. Cited in *I. C. R. Co. v. O'Connell*, 59 Ill. App. 463, 2 Am. Neg. Cas. 539.

Affirmed in 151 Ill. 542, 2 Am. Neg. Cas. 713.

2. See note at the end of this case on damages for injuries.

In the act of alighting from the car, while it was standing still, the bottom of her dress, as she says, caught upon a bolt or something that protruded above the floor of the car, and caused her to trip or stumble, or both, and fall to the ground, occasioning severe injuries to her.

The jury gave appellee a verdict for \$13,500, from which, at the suggestion of the court, \$3,500 was remitted (1), and thereupon judgment was entered for \$10,000 against appellant.

Even at the reduced amount the judgment seems to be a large one, but it is doubtful if it be so large as to justify a reviewing court to set it aside on that ground. It is well settled, both in this court and the Supreme Court, that judgments in cases of this character will not be disturbed on the ground that the damages are excessive, unless it is manifest that the verdict was against the evidence, and is attributed to passion or prejudice on the part of the jury.

The evidence shows that in addition to the external bruises and the pain suffered by the appellee, internal injuries of a serious and disabling kind were occasioned to her, which have assumed, according to the testimony of the physician who was her attendant, a chronic or permanent form, and that from the time of the injury to the time of the trial, a period of more than two years, she had, as she testified, been unable to do anything in her business, which was that of a stenographer, in which for a year or more before the accident she had earned an average of \$75 to \$80 a month.

The defense, so far as the facts are concerned, was that the fall of appellee, which was not disputed, occurred from her stumbling or tripping after she had left the car and while she was hastening across the other track of the appellant in order to avoid an approaching car, and to reach another car waiting for her, to which she intended to transfer herself; and, furthermore, that the bolt upon which she claims her dress caught did not contribute in any way to her fall.

The appellee was traveling south on the west or south-bound track, and it is undisputed that she finally fell to the ground at

1. For a discussion upon and the authorities relating to a *remittitur*, see the opinion in *North Chic. St. R.R. Co. v. Wrixon*, 150 Ill. 532, 2 Am. Neg. Cas. 708.

some point on the further or east side of the north-bound track, at a distance of at least ten feet from the inside or east rail of the track on which the car she had ridden in was being run. The plat in evidence shows that each track, consisting of two rails, is five feet in width, and that the tracks are five feet apart, and the appellee herself testified that she fell after she had crossed the intervening space between the two tracks, north and south-bound, and the east rail of the north-bound track.

The substance of her description of the manner of her fall, was, as we gather it from her testimony, that as she stepped from the foot-rail of the car, her dress caught on the bolt and prevented her feet from touching the ground, as they naturally would do, and destroyed her equilibrium; that she would then have fallen to the ground but for the fact that her dress tore loose from the bolt, and let her go forward, and that in her effort to recover her equilibrium, her momentum and weight carried her along, and across the other track before she finally fell.

In corroboration of her testimony, the appellee offered in evidence, and it was received over the objection and exception of appellant, a piece of the dress which she wore at the time of the accident, showing the particular back and bottom part of the dress, with braid on it, which was, as she testified, caught and torn.

That an accident, such as appellee described, could easily have happened, if there was a convenient bolt for a dress to catch upon, needs hardly to be said.

Although other witnesses testified, in behalf of appellant, that they saw nothing to indicate to them that the falling of appellee was caused by the catching of her dress, and that they saw no indication that she was going to fall until she was well away from the car she had left, and notwithstanding her fall may have arisen from a variety of causes for which the appellant was in no manner responsible, we are not at liberty to usurp the functions of the jury who saw and heard all the witnesses in the case testify, and say they came to a wrong conclusion.

It was proved in the case that there was a bolt, or bolt head, that projected from one-half to three-quarters of an inch above the floor of the car at or about where she stepped from the floor of the car to the foot-rail. The bolt was used to hold

the foot-board upon which passengers step in getting on and off the car, and was so placed that a dress might drag over it when the wearer was in the act of alighting from the car, and it is apparent from a photograph of the car, introduced in evidence and made a part of the bill of exceptions, that under certain conditions, such as looseness of the bolt, or roughness of the bolt-head, or perhaps other conditions, the braided bottom of a woman's dress dragged over the bolt-head there shown might catch and produce exactly the result described by the appellee.

In addition to the photograph before referred to as being in evidence, the jury, by consent of both parties, inspected the car itself, which, it was agreed by both sides, was, at the time of inspecting it, in the same condition as at the time of the accident.

What they saw we have no means of knowing and cannot review. Whatever, if anything, was lacking in the other evidence to convict the appellant of negligence, we must presume, was supplied by such inspection.

That a bolt, in the position indicated, might be very dangerous to women passengers clothed in the prevailing fashion, in getting off a car, is too plain to need argument.

That the bolt in question was dangerous, the jury have found, and their finding rests in part, at least, upon evidence derived from a personal inspection of the bolt in the car itself, which is not before us, but binds us.

The instructions given and refused were very numerous, and many objections on account of them are raised. It would add nothing to the value of this opinion to take up such objections and answer them specifically and in detail, and we will, therefore, rest content by saying that, in our opinion, the jury were instructed fairly and fully by the instructions that were given, and that the court did not materially err in refusing such as were not given.

The judgment of the Circuit Court will be affirmed. (1)

1. NOTE ON DAMAGES FOR PERSONAL INJURIES.—In this case (North Chicago Street Railroad Co. v. Eldridge, *supra*) Mr. John F. Waters, the attorney for the appellee, submitted the following points in his

brief on the question of damages for personal injuries :

\$5,000 not excessive for a brakeman for a mere "stiffness" in his hand. T. W. W. R. Co. v. Fredericks, 71 Ill. 294.

WEST CHICAGO STREET RAILWAY COMPANY v. CRAIG.

Appellate Court, First District, Illinois, October, 1894.

[Reported in 57 Ill. App. 411.]

PASSENGER IN STREET CAR THROWN DOWN BY CAR SUDDENLY STARTING MAY RECOVER DAMAGES.—A passenger who entered a street car, having a two-year-old baby and a bundle in her arms, and before she was seated the car started and she was thrown down and injured, may recover damages from the railroad company for the injuries.

FROM the Superior Court of Cook County; declaration in case; plea, not guilty; trial by jury; verdict and judgment for plaintiff; appeal by defendant.

Action by Mrs. Melvina Craig to recover damages for injuries alleged to have been sustained by reason of the negligence of the

\$8,000 not excessive where a music teacher lost her hand. C. & A. R.R. Co. v. Wilson, 63 Ill. 107.

\$8,958 not excessive for an injury to a lady's spine. Ill. Cent. R.R. Co. v. Parks, 88 Ill. 373.

\$25,000 not excessive for a serious injury to the spine. C. & E. I. R.R. Co. v. Holland, 18 Brad. 418.

\$10,000 not excessive for a locomotive fireman, who was badly scalded and confined for two months, and unable to do any hard work for more than a year after the accident. St. L. & S. F. R.R. Co. v. McClain, 80 Tex. 85, 15 S. W. Rep. 789.

\$10,000 not excessive for injuries consisting of loss of leg at the ankle, causing disability to work for a year, and decreasing earning power, wound being extremely painful. Taylor v. Mo. P. R.R. Co. (Mo.), 16 S. W. Rep. 206

\$12,000 not excessive for injury to brakeman, twenty-two years old, who

had earned \$60 per month, and was unable to work for two years, and his earnings had decreased to \$10 per month. Trinity & S. R. Co. v. Lane, 79 Tex. 643; 15 S. W. Rep. 477.

\$12,040 not excessive for injury to arm of person depending on manual labor for support, greatly reducing her earning capacity. Coast Line R. Co. v. Boston, 83 Ga. 387.

\$14,167 not excessive for injury to leg disabling person for life. Gal. H. S. A. R. Co. v. Porfert, 72 Tex. 344; 37 Am. & Eng. R. Cas. 540.

\$15,000 not excessive for injury to engineer incapacitating him from any labor, and depriving him of the sense of hearing. Tex. P. R. Co. v. Johnson, 76 Tex. 421; 42 Am. & Eng. R. Cas. 7.

\$16,000 not excessive where plaintiff was permanently injured, and his heart displaced and enlarged. Ga. P. R. Co. v. Dooley, 86 Ga. 294; 12 S. E. Rep. 923.

West Chicago Street Railroad Company. It appears from the record that on the morning of October 8, 1891, the plaintiff went from her home in Downer's Grove to Chicago to do some work for her sister-in-law, Mrs. Robins, who lived at 800 West Madison street. With a two-year-old baby and a bundle in her arms she walked from the Union depot to the corner of Madison and Jefferson streets, where she boarded a Madison street car going west. She was well inside the car, which was a closed one with seats running along the side, and was about to sit down, when the car started and she was thrown down on the floor, striking her left hip and head, and sustaining, as she alleges, serious internal injuries. She proceeded to 800 West Madison street, remained there four days, and then returned to Downer's Grove.

EDMUND FURTHMANN and VAN VECHTEN VEEDER, for appellant.

JOHN F. WATERS, for appellee.

Waterman, J.—We are strenuously urged, with able and ingenious argument, to enunciate in this case a new rule of law based upon the imperative demand of the public for rapid transit. If, we are told, street cars are not to start until passengers are seated, it is manifest that much more time than is now occupied will be consumed in going to and fro in the city.

We have no doubt of this. We recognize the wish of the public and the effort of the defendant to satisfy it.

Nevertheless, the rule remains that common carriers, while not insurers of safety, are, so far as human care and foresight can go in ways consistent with the nature of the business to be done, to provide for the safety of passengers. Hutch. on Carr. § 498.

If, then, it is asked, the starting of a car before the passenger has reached a seat is necessary in order to reach destinations at the time demanded and promised, must the company respond in damages to one who, by such starting, is thrown down and injured?

Not if human care and foresight could not have prevented such injury, it may be answered.

But has the defendant established in this case that by no human prudence could it have saved the plaintiff from falling? Is it not reasonable to believe that if the defendant had placed in its car a servant, whose sole duty it was to assist passengers to seats and to

keep them from falling until seated, the accident now under consideration would have been avoided?

Whether this or any other means for safety was practicable is not for us to say; it is sufficient for the purposes of this case that appellant has not shown that it did all that, consistent with its business, human foresight and care could have done, to insure plaintiff's safety.

The damages awarded in this case seem, under the evidence, to be large. That the injuries of appellee are not exaggerated, we are by no means convinced, or that the symptoms of which she now complains are to be attributed to her fall, we are not satisfied.

This court is not the tribunal to which the determination of these matters is committed.

While we know that juries in cases of this kind are prone to award large damages against corporations, we cannot reverse on this account the judgment by the plaintiff recovered. We cannot in this case say that the verdict was the result of passion or prejudice. There is evidence tending to show that the injuries of the plaintiff resulting from the accident are of a serious and permanent nature.

The judge before whom this cause was tried had a much better opportunity than we have to determine whether the damages awarded are excessive.

By entering judgment upon the verdict of the jury he has made its action effective.

If the damages given seem to him unwarranted in amount, he should have set the verdict aside unless a remittitur were made, so as to bring the sum within his approval. We, who can judge only by the record here presented, find in it no sufficient reason for interfering with the action of the trial court.

We do not agree with counsel for appellant in their criticism of the action of the court below in giving and refusing instructions. The request to give the following might properly have been granted, although its substance is found in others that were given:

"10. In this case you may properly find, inquire, and from the evidence determine how, in fact, the plaintiff came to be injured, if you find she was injured. She claims that while she was a passenger on one of the defendant's cars, and was walking to a seat

in the car, defendant, without giving her a reasonable time to be seated, carelessly, negligently and suddenly started the car with a violent jerk, whereby she was thrown down and injured, and this the defendant denies.

"The burden is upon the plaintiff to show, by a preponderance of the evidence, that, in fact, she was thrown down and injured, as she alleges in her declaration, and unless you, from the evidence, find that she was thrown down and injured as charged in the declaration, you must find the defendant not guilty."

The judgment of the Circuit Court is affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY V. O'CONNELL.

Appellate Court, First District, Illinois, March, 1895.

[Reported in 59 Ill. App. 463.]

RAILROAD COMPANY LIABLE FOR INJURY CAUSED BY DRESS OF PASSENGER, WHO WAS ALIGHTING, CATCHING ON COUPLING PIN.—Where it appeared that upon the arrival of a train at a station a woman, with a child in her arms, attempted to alight, and as she was in the act of stepping to the ground, there being no station platform, her dress caught upon an extra coupling pin that was in its usual place and projected two or three inches above the beam that formed a part of the car platform, and she was thereby jerked and fell and sustained injuries, the railroad company was liable.

SIDNEY F. ANDREWS, attorney for appellant; JAMES FENTRESS, of counsel.

JOHN F. WATERS and HIRAM BLAISDELL, for appellee.

Shepard, J.—In the forenoon of July 7, 1892, plaintiff, then aged thirty-one years of age, was a passenger on one of the defendant's trains to be carried from the foot of Lake street, in Chicago, to a station on defendant's road called South Chicago. When the train arrived at South Chicago, the conductor called out the station, and plaintiff walked out on the platform of the car in which she had been riding and proceeded to descend the steps of the car until she reached the lowest step. There was no station platform at that station for her to step upon.

The distance from the bottom step to the ground was about two feet. She was carrying her two-year-old child in her arms, and as she was attempting to step from the lowest step to the

ground, her dress caught on an extra coupling-pin, which was being carried in its usual place, and projected two or three inches above the top of the beam that forms a part of the car platform, and she was jerked and fell. She was pregnant at the time, and on account of the injury and shock immediately gave birth to a *fetus* about three months old. In December of the following year she suffered another miscarriage on account of general weakness and nervous prostration. Before the injury she was a strong and healthy woman.

The car platform, coupling-pin in question, and everything pertaining thereto, were in the usual and customary condition and in their usual places.

Counsel for appellants says in his brief: "While the appellant denies that the plaintiff received any injury, it does not deny that her dress caught on the head of this pin; but it claims that the catching of her dress thereon was purely an accident, the happening of which it could not have reasonably foreseen and provided against; that the carrying of such a pin as this was an essential part of the Miller platform, one of the safest platforms known to and in use by every first-class railroad company in the country; that it, appellant, had used this Miller platform and carried such a pin in a similar position on all of its many suburban cars for more than twenty years, and it would have shown, had the court permitted it, that many millions of passengers had been carried safely and without injury occurring from having such a pin as the one in question in a similar place on its cars."

As we gather from the testimony of Barr, a superintendent of railway motive power, who was a witness for the appellant, this extra pin is carried on cars using the Miller platform and hook, mainly, if not exclusively, for use in cases where it should become necessary to couple to cars that are coupled only by a link, and for that purpose the pin usually, if not always, accompanies the Miller platform, and forms a part of its equipment, although never necessary in coupling two cars that are furnished with the Miller platform and coupler. We are aided in our understanding of the evidence concerning the location of the pin when not in use, and its appearance above the beam where it is carried, by a photograph introduced in evidence by the appellant showing the end of a passenger car having the Miller equipment.

An inspection of the photograph, as well as the testimony that is not contradicted, shows that this pin, with a ring in it to which is attached a chain, projects above the end beam of the car, in a hole through which it is carried, some two or three inches. It is not covered or protected in any way, except that the hand-rail which springs from the end of the beam and is carried around and over it at a height of probably three feet to the brake-rod, may be said to be a protection or covering. At least two of appellant's witnesses testify that the pin might as handily and usefully be carried in a different place with greater safety, and the photograph corroborates such evidence and demonstrates its truth to our senses.

While men wearing their customary clothing could hardly be caught and injured by a pin placed as this one was, it seems, viewed as the photograph enables us to see it, as though such a pin projecting two or three inches above an end beam, the top of which is on a level with the floor, and forms a part of the car platform, and close to where the car steps begin to descend, was a dangerous thing and full of peril to women with their customary skirts, who should descend the steps provided for passengers to leave the cars by.

While it is true that railway carriers of passengers are not insurers of the safety of their passengers, it is their duty to exercise the highest degree of care consistent with their avocation. A danger that might readily be discovered or anticipated by reasonable and practicable care and diligence must be avoided in order that the carrier shall escape liability. *C. & A. R.R. Co. v. Pittsburg*, 123 Ill. 9; *C. & A. R.R. Co. v. Michie*, 83 Ill. 427; *Seymour v. C. B. & Q. R.R. Co.*, 3 Biss. 43.

The question in such a case is not whether the peril was one to which passengers had long been subjected and from which no injury had previously befallen, but whether it is such as might and ought in the exercise of reasonable diligence to have been known to and guarded against by the carrier in the exercise of that high degree of care which the carrier owes to its passengers.

The evidence shows satisfactorily that it was an unnecessary peril, and one which, in our opinion, becomes apparent to any one who, in the light of what did actually happen, shall regard it. That it was not perilous to a woman passenger who should alight

at a station provided with a platform on a level with a car platform, is entitled to no consideration. The fact here was that the appellant had provided no station platform, and that all passengers had to descend the car steps to the ground, which was on a level with the rails of the road. This pin sticking up above the beam into which it was inserted at a place close to where the car steps began to descend, would manifestly afford a ready object for the skirts of a woman, which might be swung by an untoward breeze, or the motion of the wearer, to catch upon.

Now that it has happened, it is obvious to all intelligent persons that such an occurrence was liable to happen at any time under like condition. And it is no excuse for appellant's lack of duty that a similar accident had never before happened in the course of appellant's business, and that appellant had no reason from its past experience to foresee that the accident would occur.

Under the circumstances shown, it was the duty of appellant to have foreseen what is so apparent, and to have avoided it.

The case of *N. C. S. R.R. Co. v. Eldridge*, 51 Ill. App. 430, affirmed in 151 Ill. 542, possesses numerous features pertaining to the manner of the accident, like this. What we have said sufficiently answers the questions argued concerning the rejection of offered evidence, and upon the instructions.

That the appellee was seriously injured by the fall seems to be a warranted conclusion from the evidence, and looking to the evidence alone we cannot say that the judgment for \$5,000 was for too much.

No substantial error existing in the record, the judgment will be affirmed.

THE CHICAGO, BURLINGTON & QUINCY RAIL-ROAD COMPANY v. HAZZARD. (1)

Supreme Court, Illinois, April, 1861.

[Reported in 26 Ill. 373.]

PASSENGER ON FREIGHT TRAIN—JERKING OF TRAIN NOT NEGLIGENCE—NO CHAIN ACROSS RAILING OF CABOOSE PLATFORM—STATEMENT BY CONDUCTOR NOT DIRECTION TO GET OFF.—Where it appeared that when a freight train was approaching a station and traveling about three miles an hour, a passenger, who had been told by the conductor that passengers sometimes got off before the station was reached, went on the rear platform of the caboose, and the train was jerked by the sudden letting on of steam by the engineer, and there being no guard chain across the railing, the passenger was thrown from the train and injured, the court *held*, that the proximate cause of the injury was the attempt of the passenger to leave the train when it was in motion and that it was not negligence on the part of the engineer to let on the steam when he did, as it was necessary in order to get the train, which was a long and heavy one, to the station, nor was it negligence not to have a chain across the railing of the car, the train not being a passenger train, nor was the statement of the conductor a direction to get off.

APPEAL from judgment in the trial court entered for plaintiff.

The facts appear in the opinion of BREESE, J.

WALKER, VAN ARMAN & DEXTER, for appellant.

J. MANNING and E. VAN BUREN, for appellee.

Breese, J.—This is an action on the case brought by the plaintiff, a member of the bar of this court, against the Chicago, Burlington and Quincy Railroad Company. There are four counts in the declaration. In the first it is averred, in substance, that at the time of the alleged injury the defendant was a body corporate, and was the owner and proprietor of a railroad extending through and from Kewanee, in said State, to Galesburg, in said county, with trains of cars running thereon for the conveyance of goods and passengers. That on the 29th June, 1860, the plaintiff, at

1. Cited in *L. N. A. & C. R'y Co. v. Johnson*, 44 Ill. App. 56, 2 Am. Neg. Cas. 517; *C. B. & Q. R.R. Co. v. Payne*, 49 Ill. 499, 503; *C. B. & Q. R.R. Co. v. Johnson*, 103 Ill. 512, 521; *Calumet Iron, etc. Co. v. Martin*, 115 Ill. 358, 368, 372; *N. C. St. R'y Co. v. Louis*, 138 Ill. 9, 11; *C. & A. R. Co. v. Arnol*, 144 Ill. 271, 2 Am. Neg. Cas. 694. See, also, note at end of this case.

Kewanee, became a passenger on defendant's said cars, to be safely carried thereon from Kewanee to Galesburg, for the sum of one dollar, then and there paid to the defendant.

That the defendant then and there received the plaintiff as such passenger, and it thereupon became the duty of the defendant safely to carry the plaintiff from Kewanee to Galesburg, and that there its train should be reasonably stopped and slackened in its speed to enable the plaintiff to alight without injury to his person.

But that the defendant did not use due care that the train should be stopped and slackened in its speed at Galesburg, so that the plaintiff should be safely discharged from and permitted to leave said cars, but neglected to do so, and after the arrival of said train at Galesburg, and whilst the plaintiff, with the consent and permission of the defendant, was alighting from said train, caused the same to be suddenly and violently started and moved, by means whereof the plaintiff was violently thrown to the ground, and his ankle dislocated and right leg fractured, and plaintiff otherwise injured, etc.

The second count is like the first, except that the duty, and violation thereof, is alleged as follows:

"And thereupon it became the duty of the defendant to use due and proper care that the plaintiff be safely carried from Kewanee to Galesburg, and there be safely discharged and released from said train of cars. But the defendant so carelessly, negligently and unskillfully run, managed and conducted said train of cars, that while the plaintiff was such passenger on said train, he was, by the carelessness and negligence of the defendant, violently thrown upon the ground, by means whereof the legs, feet and ankles of the plaintiff were fractured, dislocated and broken," etc.

In the third count, the duty of defendant, and breach thereof, after having set forth that on the day and year aforesaid, the plaintiff had become a passenger on the cars of the defendant from Kewanee to Galesburg, is alleged as follows:

"And thereupon it became the duty of the defendant to provide safe and suitable cars, with railings, guards and protections upon and around the platforms of said cars, so that passengers thereon could safely and securely go out upon said platforms in getting from the said cars, and to use due care that the said plain-

tiff be safely carried upon said cars from Kewanee to Galesburg, and there be safely discharged and delivered therefrom.

"That the defendant did not provide cars for passengers in said train with suitable railings, guards and protections around the platforms thereof, so that passengers upon said train could safely go upon said platform in getting off the said cars; and did not use proper care that the plaintiff be so carried and delivered, as aforesaid, at Galesburg.

"But the passenger car used in said train, on which the plaintiff was carried, was without any such suitable railings, guards or protections upon or around the platforms thereof; and the defendant so carelessly managed the train while he, the plaintiff, was a passenger thereon, and while he was being discharged and getting therefrom, at Galesburg, that by reason of the passenger car in said train, upon which he was carried, not being provided with suitable railings, guards or protections upon or around the platforms thereof, as aforesaid, and by reason of the carelessness and negligence of the defendant in the management of said train of cars, while the plaintiff was getting off the same at Galesburg, was violently thrown from said cars upon the ground, and his foot and ankle thereby fractured and dislocated," etc.

In the fourth count, the plaintiff, after setting forth that defendant was a common carrier, and that he took passage on its cars, etc., substantially as in the first count, alleges, that it thereupon became the duty of the defendant to provide safe and suitable cars, with railings, guards and protections upon and around the platforms of said cars, so that passengers could safely go out upon said platform in getting off said cars.

And to use due care that the plaintiff should be safely conveyed on said train from Kewanee to Galesburg, and at the station house of defendant at Galesburg, that being the proper and usual place of discharging and delivering passengers, should be safely discharged from said train of cars.

That the defendant did not have cars for the carriage of passengers in said train with suitable railings, guards and protections around the platforms thereof, so that passengers could go upon the platforms safely in getting off said cars.

That it did not use due diligence that the plaintiff should be so carried on said train, and at said station house delivered therefrom.

But that the car used in said train, and on which the plaintiff was carried, was without suitable railings around the platforms thereof.

That defendant undertook improperly to discharge the plaintiff from said train before it had arrived at the station house of the defendant at Galesburg, and while the cars were in motion at an improper time and "place, and so carelessly managed the train, that whilst the plaintiff was being discharged therefrom, by reason of the car not being provided with suitable guards, railings and protections around the platforms thereof, and by reason of the defendant undertaking to discharge the plaintiff therefrom while it was in motion, and before it had arrived at the station house, and by reason of the careless management of said train while the plaintiff was getting off the same, he, the said plaintiff, was violently thrown through the doorway, and over the platform of said car, and onto the track of said road, and thereby his right foot and ankle were dislocated," etc.

To this declaration, the defendant filed the plea of not guilty, upon which issue was joined, the trial of which was had in said court before a jury, on the 28th of February, 1861.

There is no point made here, or in the court below, of the sufficiency of the declaration. The rule being, that the plaintiff, in cases like this, must allege and show affirmatively that the defendants were guilty of negligence, and also, that he himself exercised proper care, it would seem, on the principles of correct pleading, that his exercise of proper care, as well as the negligence of the defendant, should be alleged in the declaration. If both must be proved, both must be alleged. In this respect, then, the declaration was bad, for there is no averment in it that the plaintiff exercised proper care. The books are full of cases where in such actions as this the burden of proof is always held to be on the plaintiff, that he was himself exercising ordinary care and diligence at the time the accident happened. *Butterfield v. Forester*, 11 East, 60 (1), is a leading case on that point. *G. & C. U. R.R. Co. v. Fay*, 16 Ill. 569.

1. In *Butterfield v. Forester*, 11 East, 60, it was *held*, that one who is injured by an obstruction in a highway against which he fell, cannot maintain an action, if it appears that he was riding with great violence and want of ordinary care, but for which he might have seen and avoided the

But passing from the declaration, the jury have found on all the counts in favor of the plaintiff, and ignored all pretense of a corresponding or greater degree, or any degree, of negligence on his part, and we are to inquire if they have found according to the law and the evidence. And here this court is met by the acknowledged doctrine, that the jury having found their verdict, it ought not to be disturbed, unless it appears that they have so mistaken or misapprehended the facts, as to compel the inference that they have been actuated by prejudice or partiality in the finding—that they have found palpably and manifestly against the evidence. As a general rule, it is undoubtedly true, that courts will not, and ought not, to set aside a verdict because the jury have found against the weight of evidence, unless palpably so, or on insufficient evidence, or for a misdirection of the court on questions of law, or a disregard of the instructions of the court as to the law; but this is with the well understood proviso, that the court shall, notwithstanding, be satisfied, on the whole record, that substantial justice has been done.

As to the question of negligence: it consisted on the theory of the plaintiff below, first, in causing a jerking of the train at the particular time and place when and where the accident happened; second, in not having up a sufficient guard or chain at the rear end of the rear car to prevent passengers from being thrown off, or over the platform of the car; third, in the conductor of the train failing to caution the plaintiff, he knowing that the plaintiff was about to get off, and apprising him of the danger to which he was about to expose himself, and failing to render him such assistance as would have protected him from danger. In these consist the negligence charged. We do not propose to go into the whole evidence and repeat it here, as it is very voluminous, but state only the impression it has made upon us, after a careful study of it. As to the necessity of jerking the train at the particular time and place: the practice with all trains seems to be, that on approaching a station, for the purpose of slackening the speed, the driver, at an appointed place, shuts off the steam, and from

obstruction. The rule was also laid down that a person suing for an injury must show not only that such injury was due to the negligence of the defendant, but that he himself was free from negligence in the matter, and that the burden of proof was upon him to show such facts.

that place the train is allowed to run by its own momentum, and if that is not great enough for the purpose of moving it to its destined place, of which the driver is to judge, he lets on steam sufficient for the purpose. With steam as the propelling power, by shutting it off, and suffering the train to move by its own momentum, relieves it of the strain on the connecting bars, and closes it up to the engine; and increasing the momentum, by letting on steam, these bars are drawn out, or the slack, as it is called, taken up with a jerk of more or less violence.

Three witnesses on the part of the plaintiff, who were, or had been, connected with railroads, one of whom only was an engine driver, testify that, in their judgment, it was not necessary to let on steam at that particular time and place, the train having sufficient momentum, moving at the rate of three miles an hour, to carry it to its place of destination. Other witnesses, with equal or superior advantages of knowing the facts, greatly exceeding in number those of the plaintiff, give it as their opinion, that such a train as that—a heavy freight train made up of fifteen or twenty cars—running three miles an hour at South street, the place where the accident happened, could not run on to the scales, the usual stopping place, a distance of five hundred feet, by its own momentum; and the reason is, as shown by the diagram and by the witnesses, that several frogs and switches had to be passed, impeding necessarily, by increased friction, the motion of a heavy train. To overcome this, it was the driver's business and duty to let on sufficient steam. The exact quantity to be put on can never, in any case, by the most skillful and attentive driver, be exactly calculated, but he will always, if he performs his duty, let on enough. We think it was clearly shown, that on the arrival of the train at South street, under its own momentum, it could not reach the scales without letting on steam, and we hold that it is not negligence, if more than the exact and precise quantity, when carefully gauged, and really necessary to overcome the increased friction at the frogs and switches, was let on by the driver. It is not to be expected that the quantity can be accurately gauged to a pound or ounce. If only steam enough be let on to start or increase the speed of one car at a time, the whole power of the engine would be lost, and the speed of the train would not be accelerated. A judicious and skillful driver will always let on

steam enough to accomplish the whole object, and if he should happen to let on a few pounds more than precisely enough, he cannot be charged in so doing with negligence, want of skill, or improper management. No driver can be found who could in a moment make the exact calculation, and railroad companies must use the men they can find, with the imperfections attaching to the best of them. But the plaintiff insists, that if it was necessary to let on steam, still it was not necessary, in so doing, to jerk the train, so as to throw him off or over the platform.

On this point, the same three witnesses produced by the plaintiff testify, that with proper skill and caution the driver can so let on steam as to move the train without much, if any, jerk, if his engine is in good order.

Thirteen witnesses on the other side, equally competent and reliable, all concur in saying that freight trains are all liable to these jerks, and that they cannot be prevented when steam is put on, even if the engine is in good order. When running slowly, the speed having been suddenly slackened, the train has closed up on the engine, and in drawing it out again, by letting on steam, there must be a jerk. It needs no witnesses to prove this; it is palpable to the most careless observer. The longer the train is, the more violent must be the jerk, and the rear car will feel it the most, and in such a train as this was, a person incautiously standing at the door of the rear car with one leg extended to get on the platform, would be disturbed in his balance, and lose his erect position, with the chances greatly in favor of his falling out. It is unimportant how many witnesses may swear, that an engine driver, of competent skill, can always regulate the exact amount of steam to let on. He may put on just as little or just as much as he pleases, if he has perfect control of the throttle valve, but how much, or how little he shall put on, at a particular time, cannot be precisely estimated, even with such control of the valve. His duty is, to put on enough. Jerking, then, is inevitable. Some of these witnesses, it appears, were employees of the defendant, and that fact has given occasion for an onslaught upon their veracity and integrity, which, in proportion to its violence, has not failed in its effect upon the jury. Why they should be discredited to any greater extent than the agents and employees of individuals, is incomprehensible, except upon the supposition that

railroad companies are not in favor with the public, and every man connected with them, no matter how high his character may be in society, among those who know him best, is stigmatized by his employment, and his veracity impeachable from that circumstance alone.

That this jerking was inevitable, we think, is abundantly proved, and not ascribable to negligence, want of skill or improper management of any agent or employee of the defendants.

If it be true, as represented by the defendants' witnesses, that a sudden jerk will throw an unguarded man off his feet, the plaintiff insists, it is a mystery why the brakemen, who operate their brakes on the top of the car, are not frequently thrown off and killed. There is no evidence as to such casualties attending such brakemen, but we can well understand why they should not fall off, as they have the wheel of the brake to hold onto. Their situation, therefore, would be thought to be comparatively a safe one.

Pursuing further the question of negligence, the plaintiff contends that a guard chain, extending from railing to railing, across the open space through which he fell, would have prevented his fall, and, if so, the absence of such chain was negligence on the part of the defendant.

There is much testimony to this point. Some five witnesses for the plaintiff stated that such chains have been and are now used, on several roads, at the rear end of the rear car on passenger trains—such cars as are designed for passengers—and that, in their opinion, they are a necessary safeguard for the protection of passengers, and, in case of a sudden jerk, such chains would quite likely save a man from falling off the platform. Two of these witnesses gave evidence of being themselves saved by such a chain, and one of them had seen a woman, with a child in her arms, saved by it, where there was a sudden jerk of the train.

More than a dozen witnesses for the defense, equally intelligent, skillful and reputable, gave their testimony that such chains had been used at one time on most passenger cars, but for the last three or four years had been generally discarded, especially throughout the West, as of no use, affording but little, if any, protection to passengers, and as greatly incommoding both passengers, conductors and brakemen. This is testimony in regard

to passenger cars, strictly so. All the witnesses concur in saying that on freight cars, or caboose cars, such as the plaintiff occupied, no chain was ever used by any company. Among the millions of passengers by railroad, if it does appear that two or three persons have been saved from falling off the platform by a guard-chain, does that prove it would be negligence in a company that did not provide them? A railroad company cannot provide, nor is it their duty to provide, every possible and conceivable safeguard for their passengers. If it was their duty a passenger could not go from one train to another for any purpose and be entirely safe without the attendance of a strong man to protect him against every conceivable accident. This would be more efficacious and protective than a chain-guard, yet who will contend it is negligence in not providing such an escort?

But this testimony, in respect to the chain-guard as a preventive of possible dangers, has reference entirely to passenger cars, strictly so called. On them they are not generally used, and of no benefit sufficient to overcome the inconvenience attending them. On a freight car, or a caboose car in which passengers may ride if they choose, a guard-chain is never used. It is in proof, this train was the regular freight train, having no passenger car attached, but a "caboose" designed for the use of the hands and other employees on the road. It is a convenience on roads whose business will not allow them to run more than one daily passenger train, and it is known to the public as an inferior mode of conveyance in all respects to the regular and neatly-fitted passenger car. The train to which this "caboose" was attached was a regular freight train, and nothing else, and for the carriage of freight; the carriage of passengers was an incident, and not the principal business of the train. But so far as the question of negligence in the conduct of the employees on the train is concerned, we should hold, they were bound to exercise the same diligence and care as on a regular passenger train. It was the practice to permit passengers to ride in it, for which the usual passenger fare was demanded, so that it is not for the defendant to deny his liability as a carrier of passengers, but it by no means follows that the defendant was bound to have the caboose as safe and convenient as a car intended only for the carriage of passengers. The caboose is seen by the traveling public—it is made for the

company's use chiefly—is known to be deficient in very many qualities, which distinguish the passenger car. One great safeguard, found on all passenger trains, to be without which would be great negligence, is the bell-cord, by which the conductor has complete control of the driver, and through him of the train, by means of well understood signals communicated by it. This cannot well be put upon a freight train, and is never found there, and from this circumstance alone, a seat in the caboose attached to it is more dangerous than in a passenger car of a passenger train. Can it be said it is negligence in not having a bell-cord to a freight train on which, for the accommodation of a person, he is permitted to ride? The public are not invited to occupy the caboose; they are permitted to do so if the urgency of business or other motives forbids delaying to wait for the regular passenger train. The passenger takes the car as he finds it, and must put up with all its deficiencies and inconveniences and want of safeguards; the company being responsible only for the care and vigilance, and skill and proper management of those having it in charge, such as it is, and that it is not defective in any essential particulars. The plaintiff knew all about this car when he got into it—he took it in preference to waiting for the passenger train. It was as safe and as well fitted as a caboose usually is. The only obligation, then, upon the defendant, was to carry the plaintiff safely in the caboose as it was. He took it as it was—it was known to him to be a freight train, with freight-train accommodations only, and he could have refused to go in it. It was not the usual way in which gentlemen in his position traveled; a few hours' delay would have given him a better mode. Taking this, he took it well knowing what he did, and well knowing it was an inferior mode of conveyance, and impliedly agreed to accept and be satisfied with such accommodations as that particular car afforded. Nobody is deceived by it. It is not held forth as a passenger car, but as an inferior car, which persons may ride in if they choose, and be content with the accommodations it offers. At the same time, the employees are held to as strict accountability in the management of a train with a caboose attached, as the law imposes in the transportation of passengers in cars specially provided for such purpose. A chain-guard is not appurtenant to such a car—is never found upon one, and it was

no negligence in not providing one for this particular car. We have said in 16 Ill. 568 (*Chicago & Galena U. R.R. Co. v. Fay*), that a passenger takes all the risks incident to the mode of travel and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance and skill to that particular means. For this and this only was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords.

But it is said by the plaintiff, that the improper management of the train by the employees of the defendant, included not only the conduct of the driver of the engine, but that of the conductor also. That he was chargeable with carelessness, if not recklessness, in directing the plaintiff into a dangerous position, without giving him notice that such position was dangerous, it being a matter entirely within his own knowledge, and not within the knowledge of the plaintiff.

On this point how stand the facts? Did the conductor give any order or direction to the plaintiff by which he was necessarily controlled? It is clear that passengers are, and must be, while upon the cars, under the control of the conductor, and this for the safety of the train and all upon it. On leaving a train, he can, no doubt, compel them to leave by a particular door or passway, and when he so orders, if an accident happens, the party using all necessary precautions, his employers might be liable, especially if it was at a place where it was not usual to land passengers. Did the conductor order, or direct, or advise the plaintiff to leave the car, while in motion, at the particular place where he did leave it? What is the testimony? We will leave out of view the evidence given by Bush, the conductor, on the part of the defendant, and that of Lombard, on the part of the plaintiff, with this remark: that the testimony of neither can change the aspect of the case which it is made to assume by the testimony of more indifferent witnesses. And it should be remembered that the testimony of Lombard was taken on a *dedimus*, some weeks, or months after the occurrence, and purports to relate, not what he saw, but what he heard, and we all know how very difficult it is to remember and repeat the precise words of a conversation that is being detailed. That kind of testimony is never satisfactory unless a memorandum of the

words has been made at the time of their utterance, or the party had a very special interest in remembering them.

It is always held that the repetition of oral statements must be subject to much imperfection. The party receiving them may not have understood the meaning correctly, or remembered the precise words used, which, if given precisely as uttered, might vary the effect of the statement.

We would be inclined to place more faith in the statements of Bush, given from the stand, subject as he was to a strict cross-examination, than to that of Lombard, without any desire to cast the least reflection upon his testimony. He gave the conversation as he remembered it, doubtless, but who shall estimate the fallacy of human memory?

We lay their statements aside, and take that of Robert E. Goodrich, who, though called by the defendant, does not appear, by the record, to be interested for either party. Yet his testimony is, for the reasons above given, subject to much imperfection, as being a repetition of what the plaintiff said to him. But in one important particular it corroborated the conductor, and he is corroborated by Dr. Bunce. The plaintiff did not cross-examine him. Mr. Goodrich says:

"I reside in Galesburg; have lived there six years; five years of that time I was railroading; am now dealing in produce. Know plaintiff; heard he got hurt last summer. I had a conversation with plaintiff, I think, the first week of July, regarding his injury. I finally asked him how the accident happened. He went on and gave a statement, that he came into Galesburg on a freight train, and instead of going down to the place where the cars stopped, got off (having had some conversation with the conductor about supper, and hearing it was too early). He asked conductor if he could get off, and that the conductor said that business men were in the habit of getting off, and that the train slackened up so that he could get off. I do not recollect the street, but train was running about three miles an hour, and he got up, took his satchel and umbrella, and went to front end of car, and conductor told him he had better, or it was more safe to get off at the hind end. He went to hind end and stepped one foot on platform, and the engine took up slack of train, and pitched him out through the opening at the hind end of car. I

asked him if he blamed the conductor, and he said he did not attach any blame to the conductor."

Now this is a succinct, and doubtless a correct statement of the main facts on this point. The testimony of Lombard does not weaken it, nor does his testimony, with that of the conductor, go to prove that he was ordered or directed by the conductor to leave the train at the place he did leave it, nor that the conductor advised it. He advised him to go to the rear door as affording a safer exit than the front door, but of the whole matter the plaintiff was his own adviser. The testimony of Dr. Bunce is nearly to the same effect. Suppose the plaintiff knew, without being informed by the conductor, that "up-town people," or business men, usually got off at that place, and had attempted to get off there, and an accident happened, would the defendant have been liable? Should the fact, then, that the conductor gave the plaintiff this information, be held to be a direction or order to him, to get off there, so as to throw the risk on the defendant? We look upon it as mere information given to the plaintiff, who seemed anxious to find a stopping place nearer his own residence than any of the usual stopping places of such a train, leaving the plaintiff perfectly free to act on his own responsibility. He was of mature age, sharp understanding, and familiar with the hazards attendant on traveling by a railroad, and if he, and not the defendant, would have been chargeable with negligence if, on his own knowledge that "up-town people" got off there, he attempted to get off, the train being in motion, is he less chargeable with negligence, because the conductor gave him that information? Surely, it cannot change his position, no matter how he got the knowledge. He was his own master and judge of what was and what was not prudent. The information given him by the conductor, that the train slackened up so that he could get off, amounts to no more than this: It is no trouble to carry you a few rods to the usual stopping place, but before reaching it, the train slacks up and runs slow, and business men residing up-town often get off. If the plaintiff had previously known this fact, and attempted to get off as business men did, and an accident happened, no reasoning can establish the defendant's liability. It would be pronounced, in business men or in any other men, as a careless and imprudent act, for doing which

they, and not the railroad company, should suffer the consequences. It is a standing precaution, known to every man, woman and child above the age of puberty, who has ever traveled on a railroad, that it is full of danger to leap or step from a car when in motion, and none do it but those who by practice know how to regulate and dispose of their own momentum. The information then, given by the conductor, makes it none the less carelessness on the part of the plaintiff. He knew, though the train was for the moment slacked up by shutting off the steam, that the slack was subject to be taken up suddenly, and his own experience told him when it is so taken up it is always with a jerk, affecting the rear car more sensibly, or in a greater degree than any other, and common prudence should have hinted to him that the "cushioned seat" upon which he was sitting was, beyond doubt, the place of greatest safety, and which he should have retained a few minutes longer, until 500 feet were passed over, and the "scales" were reached. But his anxiety to get home and get a hot supper seems to have overcome all his prudential notions, and prompted him to tempt his fate.

It cannot be denied that the attempt of the plaintiff to leave the car when it was in motion was the proximate cause of the injury, for had he remained in his seat, as an ordinarily prudent man would have done, putting on steam and taking up the slack, no matter how suddenly or how violent the jerk might have been which followed it, would not have harmed him in the least. Bush says in his testimony that the plaintiff said he did not blame him. Lombard does not give this version of the conversation. Laying their testimony aside, Goodrich says distinctly the plaintiff said to him, "he did not attach any blame to the conductor," nor could he, as the facts show; for, however strong may be the desire to throw the fault upon the defendant, the great fact stands out prominent over all others that the attempt of the plaintiff to leave the car when in motion, at a place not the regular depot or stopping place, was his own uncounseled act, not directed to do it, or advised to do it, by any agent of the defendant, or at their request, nor for their benefit, but solely that the plaintiff might accomplish more speedily a desired purpose of his own. He knew it was dangerous to be on the platform of a car when in motion for any purpose. He knew that to attempt to get off a

car when moving at the rate of three or four miles an hour was dangerous, and to do so at one door was more dangerous than at another, and the only part the conductor seemed to have acted on the occasion was in attempting to make his exit by the rear door as safe as possible, and in attempting to save him as he fell. It is scarcely possible that the plaintiff could have understood the conductor's information as an order that he should get off where business men sometimes got off. Had the conductor made such remarks as he did to an ignorant boy, or to an inexperienced woman, and they had acted upon them and been injured, carelessness and negligence might be properly chargeable, but the plaintiff was familiar with railroad traveling and had full knowledge of the risks he ran, and was acting upon his own decision.

We endeavored, in the case of *C. & G. U. R.R. Co. v. Jacobs*, 20 Ill. 478, by a review of all the American and English cases relating to negligence, to lay down some rules by which it is to be adjudged. (1) Among others, we there said, to maintain an action for negligence, there must not only be fault on the part of the defendant, but ordinary care on the part of the plaintiff must be shown. Neither of these elements are found in this case. We find no negligence, or want of skill, or improper management, on the part of the defendant, as alleged in the several counts of the declaration. The evidence we consider as convincing, that the jerking of the train was inevitable; that it was not by or through the carelessness of the defendant, or negligence or want of skill on his part, that the plaintiff was violently thrown upon the ground and his ankle fractured; that it was not the duty of the defendant to provide a guard-chain at the rear end of the caboose, such car being attached to the freight train more for the use of the employees of the road, into which passengers are not invited to take seats, but permitted only, and the plaintiff, well knowing the car and its safeguards, voluntarily, to avoid a little delay for the passenger train, placed himself in it, taking the risk of its safety; that this was a regular freight train, and nothing else; that the defendant did not undertake, improperly, to discharge the plaintiff from the train before it had arrived at the station-

1. The doctrine as to comparative negligence has been abrogated in *Alton R.R. Co. v. Bonifield*, p. 644. *post.*
Illinois. See note to *Chicago &*

house or depot of the defendant, and while the cars were in motion, but that the discharge of the plaintiff, at the time and place, and when the cars were in motion, was at his own instance and choice. The accident, therefore, was occasioned by his own want of ordinary care.

The case of the C. & G. U. R.R. Co. *v.* Yarwood, 15 Ill. 469, and the case of the same plaintiffs *v.* Fay, 16 Ill. 567, and *Same v.* Jacobs, 20 Ill. 485, settle the law of this, as arising on the facts as alleged in the declaration.

In those cases this court held, in Jacobs' case, that two things must concur to support this action—negligence on the part of the defendant, and no want of ordinary care on the part of the plaintiff, and that the question of liability does not absolutely depend on the absence of all negligence on the part of the plaintiff, but upon the relative degree or want of care, as manifested by both parties. This case shows a want of ordinary care on the part of the plaintiff. In the cases of Yarwood and Fay, it was held, that passengers took the risks incident to the mode of travel, and the character of the means of conveyance which they select, the party furnishing the means being bound only to adapt the necessary care, vigilance and skill to those means, the carrier and passenger owing reciprocal duties each to the other, and if a passenger on a railroad car is guilty of negligence by unnecessarily exposing himself to danger, or by imprudently and unnecessarily passing from one car to another while the train is in motion, and receives an injury, and his carelessness or imprudence has contributed in any way to produce the injury, he cannot recover for it; and if such passenger is chargeable with want of reasonable care, and his want of such care concurs with that of the railroad company in producing an injury to him, he cannot recover for it. These cases, particularly that of Fay, adopt the reasonings and rule laid down in Forester's case, *supra* (1), that a passenger suing for an injury must show not only that the injury to him was the result of the carelessness or negligence of the defendant, but also, that he himself was without fault in producing the injury; and the burden of proof is on him to show that the defendant was negligent, and that he himself was not guilty of negligence. The

1. See note on p. 546, *ante*.

expression, in this case, of "any negligence" by the plaintiff, must be understood as explained in Jacobs' case, 20 Ill. 485, where it is said, that all care or negligence is at best but relative, the absence of the highest possible degree of care shows the presence of some degree of negligence, slight as it may be, and that the true doctrine is, that in proportion to the negligence of the defendant should be measured the degree of care on the part of the plaintiff. The degrees of negligence should be measured and compared and considered; and whenever it appears that the plaintiff's negligence is slight, as compared with the defendant's greater or gross negligence, he must not be deprived of his action. Jacobs' case, *supra* (pp. 496-7).

We are referred by the plaintiff to the case of this same company *v. George*, 19 Ill. 517, under these points we have been discussing. We adhere to the ruling in that case, as we understand it, with the qualifications in Jacobs' case. We held, in this case, as in George's case and in the other cases cited, that carriers of passengers for hire are bound to use the utmost care and diligence in providing for the passengers' safety, by the use of proper and safe means of conveyance. The care required is not that care without the exercise of which accidents may happen; as, for example, after a passenger is received on board, he would be safer, less liable to accident, if locked up in the car, or chained to one of the seats, or other fixture, so as to deprive him of locomotion—moving from car to car. This would be the very utmost degree of care and caution, but that is not required, so that the epithet "utmost" must be taken with some qualification. It is very difficult to define the degree of care requisite. In *Boyce v. Anderson*, 2 Pet. 150, which was a case against the owners of a steamboat, employed in carrying property and passengers on the Ohio and Mississippi rivers, for the loss of some negroes by the upsetting of the boat's yawl by bad management, Chief Justice Marshall held, that the responsibility of the carrier should be measured by the law applicable to passengers, rather than by that applicable to the carriage of common goods, and that the rule of care is that of ordinary care—the care which all bailees for hire owe their employer.

The rule, however, in more modern cases, as in *Stokes v. Saltonstall*, 13 Pet. 190, is much more rigid. There it is held, if the

disaster was occasioned by the least negligence, or want of skill or prudence on the part of the defendant Stokes, who owned the coach, he would be liable. This is the rule of this court, as explained in the Jacobs case, where we hold, that the negligence of the defendant is to be measured with that of the plaintiff, and for the excess only, as against the defendant, can the jury find a verdict. From all the cases, we can gather this rule of care and diligence—that its extent is to be measured by the known perils to which passengers are exposed by the particular kind of conveyance. The more hazardous the mode, the greater the care and diligence required by both parties. The liability can only be discharged by showing that all reasonable skill and diligence have been employed, as well by the plaintiff as by the defendant.

But it is argued by the plaintiff that the jury, having found the facts alleged in the declaration, this court cannot, without stultifying itself, and without invading the rights of the jury to decide the facts, reverse their finding by declaring they do not exist, and that no negligence or carelessness on the part of the defendant was proved. Such a decision, he contends, would render useless trials by jury, and would be an invasion of the constitutional rights of the citizen. But has not the court rights and duties to perform, equally as important as those of a jury? This court is clothed with power by express statute to consider a case on the evidence, else why is the evidence certified up to this court. This court will look into the error which questions the finding of a jury, whether upon the law or the evidence, and the evidence is preserved in the record, by bill of exceptions, for such purpose. This court can and will, and uniformly does, in a proper record, scan the evidence, and if the finding of the jury is palpably against the evidence, or there be no evidence to sustain the finding, what is this court to do? Why, clearly, so to pronounce; to set aside the verdict and remand the cause for a new trial, if proper so to do. The citizen has no constitutional right to an unjust verdict, and the trial by jury would be worse than useless if there existed no supervisory power over them to correct their errors, or, as it may happen, to arrest them in a palpable and glaring attempt to do injustice. This court has a right to look into the whole record, into the facts as well as into the law, and adjust the scales which a jury may have improperly or unjustly disturbed, always regard-

ing the rules for interference, which long custom and correct principle have sanctioned, and to which we have already adverted and now obey.

The next point argued at length by the plaintiff is, the amount of damages, in reply to suggestions of the defendant that they are excessive. The plaintiff insists that this depends mostly upon the nature, extent and permanency of the injury; the effect it has produced and is likely to produce upon the physical condition of the plaintiff, his pain and suffering, both mental and physical, past and future; the effect it has upon his pecuniary interests, both as regards the expenses occasioned by the injury, and the effect it has upon his business. These are proper elements to be considered, in estimating the damages, and as to them what are the facts? No one of the surgeons describe a very serious injury. Though it may be a permanent injury, that does not make it very serious, like the loss of a limb, a hand, or foot, or an eye. It is merely, if we understand them, the displacement of a small bone of the foot called the astragalus—the ankle bone, knuckle bone or sling bone, as it is sometimes called. Displacing this turns the foot in and the toes downward. But if it is replaced, or the bone taken out, those surgeons do not say he will be disabled. Dr. Brainard, says, if the displaced piece was taken out, he would have a strong and useful foot; but the foot would be flattened, the ankle stiff, and the limb an inch shorter. He thinks the bone will be likely to unite by ligaments, which nature forms, and, when formed and united, he will not lose the motion he now has, and this motion may increase when it shall become fully united; will have to walk on the side of his foot, which may produce swelling, but if care is used, no danger of any abscess.

This, though painful enough, is nothing to the loss of the foot, the hand, eye, arm, or any other prominent limb. It is simply a displacement of the ankle bone, the most serious effect of which will be to cause the plaintiff to limp some, requiring, probably, the use of a cane to assist him in walking. His physical condition, as a whole, cannot, from the nature of the injury, be affected in any way. The pain and suffering hitherto has been, unquestionably, very great, and may be repeated, if an operation becomes necessary, of which there is no great probability, if he is careful, and refrains from using his foot until the parts are accom-

modated to each other. The expenses of his cure would also be a legitimate subject of inquiry, and can be very nearly estimated. One of the surgeons, who seems to have had the case in charge, thinks his bill will be as much as \$100, and that of the nurses, we should think, would probably be as much more. Here, then, is one item pretty accurately ascertained, if damages can in any event be allowed. For pain and suffering the jury would have a right to be liberal in a proper case, and there is no fixed rule by which, in this estimate, they are to be governed, keeping in mind all the time, that though they may give damages, they must not be so great as to carry with them the appearance of being the progeny of prejudice, passion, or other unworthy motive. The effect the injury is likely to produce on the professional business of the plaintiff, would also be taken into consideration. He is known to be a gentleman of high standing at the bar, with many clients, and with a lucrative practice extending to Chicago, and in the most important court there. How is the injury to affect that practice and his professional earnings from it?

This is, by far, the most important inquiry of all, and on which little or no evidence was given. Mr. Beardsly stated, that the plaintiff had been doing a large business, requiring him to be away from home—generally in the courts of the United States. He went last October, four months after he had received the injury, to Chicago, to attend court. At July Term, he had about one hundred cases, which were continued, whether on account of his inability to attend to them it is not stated, or that there was any loss resulting from such continuance; he attended the September Term in Knox County, about two months after receiving the injury; the Fall Term at Chicago, and last term at Chicago, of the United States Court—all within a few months after the accident. No loss is proved, as resulting from the injury, in his practice, nor can we see how he is in any manner disabled from pursuing his profession with the same ardor, with the same efficiency, and with the same profitable results as heretofore. His lameness, even if he has to be supported by a crutch or cane, will in no degree interfere with his office business, or with his pleadings in court, or with his studies in his chamber, or paralyze his laudable efforts to climb the steep

“Where Fame’s proud temple shines afar.”

The plaintiff, to his praise be it said, is an eminent attorney and counselor, skilled in drafting bills in chancery, special pleas, and in the preparation of able and voluminous briefs and important cases, and in arguing from them; how can this injury of the ankle diminish his power in these respects? Would he not, crippled as he says he is, be justified in demanding as large fees for the exertion of his brains, as before the injury? Can he not go from home to Chicago, and elsewhere, with the same ease he was wont to travel? Certainly, unless the accident shall have made him timid of railroad traveling, which is not at all probable, and especially if a large sum of money is to be derived from a comparatively slight accident. Will his income be less by what has befallen? The plaintiff says the jury did not find enough—they should have found sufficient to enable him to have retired from business, supporting his family on the interest of a fund the jury should have placed at his disposal, and giving them as good a support as he could furnish in the pursuit of his business. If this is a proper view of the case, then certainly the jury have failed in their duty. The support of the plaintiff's family cannot fall short of \$2,000 per annum. A fund to yield this amount at six per cent. should be \$33,333.33, and that should have been the verdict of the jury. But that is not the view to take; the one we have presented is the true view. How much are his professional receipts diminished, or likely to be diminished, by reason of this accident? The plaintiff is in the prime of life, in good health, and in the full enjoyment of all the faculties necessary to enable him to pursue his profession with all the industry and energy he may invoke, save, perhaps, the necessity of limping slightly, in getting to and from the various courts he attends.

Should a person whose avocations in life are not professional, but dependent for success on the free use of all his limbs, be injured, the proper inquiry in such case is, to what extent is he disabled? If a carpenter, blacksmith, or other person whose living is obtained by manual labor, should be crippled in his hand, in so far as that detracts from his power of earning his accustomed livelihood, so far should the jury give him damages over and above the usual damages for the pain and suffering, medical attendance, loss of business whilst confined, etc. So with every other profession. There is a total absence of evidence here

to show that the plaintiff has lost or will lose one dime less of income from his practice now, than he received prior to the accident. It was not in the nature of things or of the injury, that he should.

In the absence of all necessary proof on this important point, who will not say that the damages are excessive? Even if we have erred on the question of negligence, no circumstances of aggravation are shown against the defendant, and if negligent at all, it was very slight, and not to be visited by vindictive damages as these unquestionably are. Their magnitude, in full view of all the facts of the case, compel the belief that the jury who gave them was influenced by that popular prejudice existing all over the country against railroad corporations. This should not be. Juries should remember that railroad accidents are not always produced by the misconduct of agents and employees, but a large proportion of them by the carelessness and recklessness of passengers. This our experience tells us. It is a great evil, and it would be a sin to encourage it, by allowing a premium on it to be extorted from companies. However bad their behavior may sometimes be, it would not be improved by making them pay for faults not their own.

The law where death occurs by the negligence of a railroad company, no matter who the deceased may have been, howsoever distinguished, and however successful in reaping the fruits of his professional skill, or how enormous they may annually have been, cannot give to his widow or children or next of kin, more than \$5,000. The plaintiff has the same power now, that he ever had, to provide for his family. If \$5,000 is compensation for the loss of the prop and stay of the family, is not \$11,000 excessive damages, when the head of the family is no further disabled than a dislocated or fractured ankle? (1)

Whilst we shall hold railroad companies to a strict performance of all their duties, at the same time we must give them, as we give all other suitors in court, the benefit of all the rules of law and principles of justice. The judgment is reversed and the cause remanded.

1. See note on Damages for Personal Injuries, *North Chicago Street R.R. Co. v. Eldridge*, p. 532, *ante*.

Caton, Ch. J.—I am of opinion that there was negligence by both parties, and on that ground concur in reversal.

Walker, J.—I am of opinion that there was such a degree of negligence on the part of the appellee, as should prevent his recovery, and that the judgment should be reversed.

Judgment reversed. (1)

THE OHIO & MISSISSIPPI RAILROAD COMPANY v. SCHIEBE.

Supreme Court, Illinois, June, 1867.

[Reported in 44 Ill. 460.]

NEGLIGENCE TO ALIGHT FROM A MOVING TRAIN NOT AT A STATION.—Where a passenger attempts to alight from a train, slowly moving, not at a station, and the conductor warns him not to get off at that place, and takes hold of him to prevent him getting off, and the passenger is injured, he is guilty of negligence.

IT IS NOT NEGLIGENCE TO SIDE-TRACK A PASSENGER TRAIN.

—It is not negligence to side-track a passenger train to allow a freight train to pass on the main track, when it appears that the freight was too long to run on the side-track to pass, and that such a course was not unusual.

1. Judgment for the plaintiff (Hazard) having thus been reversed, the plaintiff then dismissed his suit and commenced his action in the Circuit Court for the Northern District of Illinois, in the October Term, 1865. The case was tried to a jury before Davis, J., who in his charge *held*, that a railroad company, when it takes passengers as such on its freight trains, is under the same obligation to carry them safely as if they were on the regular passenger trains, and that it is immaterial whether such passengers travel on special permits or regular tickets. In discussing the duty of railroad companies in transportation of passengers, it was *held*, that such companies, though not insurers of their passengers' lives, are

bound to use the utmost skill and diligence in carrying them safely, and to employ all proper means therein; and that passengers must have that care and regard for their own safety which prudent men would use under the circumstances. It was also charged that although an accident may have been the result of the negligence of the company's agents, still if a prudent man would not have been where, and as the plaintiff was, he could not recover. The effect of the former trial (as here reported, 26 Ill. 373) was also considered and stated. Drummond, J. concurred. The jury, however, did not agree upon a verdict. See *Hazard v. Chicago, Burlington & Quincy R.R. Co.*, 1 Biss. (U. S. Circ.) 503.

WRIT of error to the Circuit Court of St. Clair County.

William Schiebe brought action in the St. Clair Circuit Court against the Ohio and Mississippi Railroad Company to the March Term, 1867.

The declaration contained three counts. The first averred that plaintiff became a passenger on a train of defendant, to be carried from Illinoistown to Lebanon; that, in alighting from the cars with due care, defendant's servants negligently caused the train to be suddenly moved backward, whereby plaintiff was violently thrown to the ground, and his right arm broken.

The second was substantially the same as the first, except it averred that the plaintiff was thrown in the same manner from the train, and its wheels ran over and crushed his right arm.

The third count averred that defendants ran their passenger train into a side track at the Lebanon station, and while plaintiff, with due care, was attempting to alight therefrom, defendant's servants carelessly drove the train violently and suddenly backward, whereby plaintiff was thrown to the ground and his right arm cut off.

Defendant filed the plea of the general issue.

A trial was held at the return term before the court and a jury; evidence was introduced by both parties, the material part of which appears in the opinion. The jury returned a verdict for plaintiff for \$3,000.

Defendant entered a motion for a new trial, because the verdict was against the weight of evidence, which the court overruled, and rendered judgment on the verdict. Defendant thereupon prosecuted this writ of error, and urges a reversal, because the court overruled the motion for a new trial.

H. P. BUXTON, for the appellant.

JOSEPH B. UNDERWOOD, for the appellee.

Walker, J.—This was an action on the case brought by appellee in the St. Clair Circuit Court against appellants for negligence in operating their trains, whereby he was injured. It appears that appellee became a passenger at Illinoistown for Lebanon on a passenger train of appellants. That, on arriving at Lebanon, a freight train, being too long for the side track, had stopped on the main track, and the passenger train, having slackened up, moved upon the side track to permit the freight

train to pass. As the passenger train started appellee attempted to get off, and in doing so fell, and one of his arms was crushed, and was afterwards amputated. He insists that the injury was produced by the carelessness of the employees of the company, while they contend that it arose from his own want of care and prudence.

Appellee swears, that, after the train had stopped and was starting again, someone said the train was going to Summerfield, which was the next station. That he thereupon took his baggage, and went out upon the platform, and just at that time, "the locomotive gave a push backward, and I fell down by the wheels, and the locomotive then went backward and the wheel went over my right arm," and the doctor amputated it. "The locomotive came back with great force." "I think a man and his wife got out before me safely: it was forty or fifty yards from the station where I was hurt; I cannot tell whether Lebanon was announced or not; I did not hear it; I did not see anything of the conductor, or any brakeman when I went to the door of the car, and no one told me not to get out." He says the night was very dark, and in this he is supported by other testimony.

Two witnesses, besides the conductor, testified that the conductor told him not to get off there; that it was not the station. They say they heard the warning. They were just behind him and had started to pass from the car. They say this occurred at the door of the car, and as the conductor met appellee on the platform in coming from the next car. Another passenger in the same car testifies, that, as the crowd started to go out, he heard someone at the door say, "We have not got to the station yet;" that it was about the time appellee was hurt. He says he does not know who it was that gave the warning; that he was about the middle of the car.

The conductor testified, that, as he came out of one car to the platform, appellee was coming out of the opposite car with some bundles in his hands; that witness said to him, "Do not get off here; we are not at the station;" but appellee walked along and stepped down on the steps of the car, and that he (witness) took hold of his shoulder and said, "Don't get off here;" but appellee was too heavy for him to hold, in the position which witness then occupied, and he fell. There seems to be no other witness than

appellee who testified that there was a violent jerking by the train at the time the accident occurred. Some of the witnesses gave it as their opinion that appellee was under the influence of liquor at the time; but this he denied; and said he had only drunk one glass of beer that day, and that was in the morning.

If the testimony given by appellee was alone considered, the jury might have been warranted in the conclusion at which they arrived; but his testimony is overcome by the testimony of at least four witnesses as to the warning given, "That they had not reached the station;" and three of them state positively that he was directed by the conductor not to pass from the cars at that place. These witnesses, as far as we can see from this record, stand unimpeached, and are entitled to credit. This evidence may, no doubt, be reconciled. Appellee may have been so fully possessed with the idea of getting from the cars, and thus avoid being taken to the next station, that he failed to give ordinary attention to what was said and done at the time. If his mind was greatly preoccupied with such an apprehension, and he was not giving his attention to what others were doing, he might and probably would not hear the warning or directions given by the conductor. The others, however, seem to have been giving proper attention, and state positively that the warning was given, and that they heard it distinctly.

Appellee states that the conductor did not take hold of him, while the latter states that he did, and is fully supported in the statement of Ellen Macken. We are wholly unable to comprehend how so many witnesses could be mistaken as to what they saw and heard. On the other hand, appellee may have been, and no doubt was, badly stunned by the fall, and would be less likely to recall the circumstances than others not subjected to such a peril. It is more than probable that the conductor took hold of him while he was in the act of falling, and if so, it was natural for appellee to have been entirely occupied with his situation and the apprehension of its results; under such circumstances it would be remarkable if his attention was attracted to the fact that the conductor had hold of him, or, if noticed at the instant, that he could recall it to memory. The evidence, we think, preponderates largely in favor of the occurrence as detailed by appellants' witnesses.

This case proceeds upon the ground of negligence on the part of appellants. But, when we consider the circumstances, we are unable to see that they have been derelict in any duty. Appellee says he did not hear the name of the station announced, and it was, we presume, not done, as the train had not reached the station. He either failed, for want of attention, to hear the emphatic warning of the conductor, or he failed to regard it. Nor was there any negligence shown in running the train on the side track, to permit the freight train to pass on the main track. The evidence shows that such a course was not unusual, and in this instance it was necessary. And the weight of evidence is, that there was no violent jerking of the train; but if there had been, it was not negligence, as the train had not reached the platform where passengers were expected to get off. Appellee was attempting to pass from the train while in motion, and at an unusual place. If there was negligence it was on the part of appellee.

The judgment of the court below is reversed and the cause remanded.

THE KEOKUK PACKET COMPANY v. HENRY. (1)

Supreme Court, Illinois, January, 1869.

[Reported in 50 Ill. 264.]

JUMPING FROM STEAMBOAT—NEGLIGENCE OF COMPANY WILL.

NOT EXCUSE NEGLIGENCE OF PERSON JUMPING.—In an action for injuries where it appeared that the plaintiff escorted his daughter on board a steamboat, and on attempting to leave the boat found it had begun to back into the stream, and to save himself from being carried off, jumped to the shore and was injured, the court *held*, that although the boat was violating the law by racing with another boat, and by reason thereof its stoppage at the usual landing was abridged, so that plaintiff had not a reasonable time allowed him to leave the boat in the usual manner by the staging, still, that did not relieve him from the duty of exercising proper care and prudence in leaving the boat.

EVERY PERSON BOARDING STEAMBOAT NOT PRESUMED TO BE PASSENGER.—It is not a presumption of law that every person who goes on board a steamboat at one of its usual stopping places does so as a passenger.

1. Cited in *C. B. & Q. R.R. Co. v. Lee*, 60 Ill. 501, 506.

APPEAL from the Alton City Court.

Action by John Henry against the Keokuk Packet Company to recover damages for an injury to him resulting, as alleged, from the negligence of the officers of one of the boats of the company in not affording plaintiff proper time and facilities for leaving said boat. The declaration contains four counts, the first of which sets forth substantially the alleged cause of action as follows: That on June 1, 1867, the defendant was and still is a corporation, under the name and style of the Keokuk Packet Company, owning and possessed of a line of passenger packets, which it operated. Plaintiff avers on the day and year aforesaid he accompanied a lady, his daughter, who then and there became a passenger on the steamer Rob Roy, a passenger packet, owned and operated by defendant in said line; that as soon as said boat was landed at the wharf at the city of Alton, with all reasonable care and diligence, went on board said boat to conduct and escort said lady, his daughter, safely to the cabin of said boat, as it was customary in such cases to do. Plaintiff avers that while he was in the act of escorting said lady on said boat, and up the stairs to the cabin thereof, without delay or stoppage, and with due diligence and care, said boat, directed and managed by the servants of the defendant, then and there began to back out from the landing without the knowledge of the plaintiff; and plaintiff avers that it was the duty of the defendant to ring a bell or blow a whistle attached to said boat before said boat began to leave the landing, in order to give warning to parties having temporary business on board said boat. Plaintiff avers that said boat, so under the direction and management of the servants of the defendant, was then and there making a race of the trip from St. Louis, to ports of destination up the Mississippi River, with another boat, and that defendant conducted the boat Rob Roy with such gross carelessness and negligence, in preparing to leave and in leaving the landing, by not giving warning as aforesaid, nor otherwise thereof, that plaintiff did not and could not become aware of such preparation and departure until the Rob Roy was in motion and backing away from shore. Plaintiff avers that with all due and proper diligence he had time to reach the top of the stairs leading from the boiler deck of said Rob Roy to the cabin deck thereof, with his daughter, when he first perceived said boat in motion. That

upon becoming aware said boat was in motion and leaving shore, he turned and, with all reasonable diligence and care, retraced his steps to the guards of said boat, to the proper and usual place for getting on and off said boat, for the purpose of being allowed to depart and alight from said boat in the proper manner. Plaintiff avers that the stage planks and other planks used for getting on and off said boat were drawn onto said boat, and that the servants of defendant, directing and managing said boat, were present and aware that he desired to alight from said boat and get on shore, but defendant did not stop the boat and land him in the usual and proper manner or in any other way, or offer so to do; but refused so to do, and continued to recede from shore, and forced plaintiff to leap to shore from the guards of said boat, to prevent himself from being carried away from home and subjected to privations and false imprisonment. And plaintiff avers that in so leaping, with all prudence, care and diligence, from the guards of said boat to the shore, he, the plaintiff, was violently thrown to the ground and his ankle dislocated and several bones of his leg fractured, and the plaintiff otherwise injured.

Among other instructions given for the plaintiff were the following:

"2. That it is unlawful for one boat to run a race with another, and if the jury believe from the evidence that the Rob Roy was engaged in a race with the Phil Sheridan on the trip at the time the injury complained of happened to the plaintiff, and that on account of such racing the officers in charge of the Rob Roy did not allow said boat to remain at the levee a reasonable length of time to enable the plaintiff, with proper diligence, to escort his daughter to the cabin of the boat and return and get off the boat in the usual and customary manner, and in consequence thereof the plaintiff was injured, as set forth in the declaration, they will find for the plaintiff, and assess his damages in such an amount as, in their judgment, he is entitled to under the testimony.

"6. If the jury believe from the evidence that the boat was in motion, and that the stagings were on board or being drawn on, and that it would have been as dangerous for the plaintiff, under the circumstances, to get off the boat by way of the staging as it was in getting off the way he did, they will find for the plaintiff as to that fact."

To the giving of which instructions the defendant at the time excepted.

The following instructions asked by the defendant were refused:

"5. When a boat has regular stopping places, in order to take on passengers and freight, the presumption of law is, that a person who goes on the boat at any of the stopping places goes on as a passenger, unless he has given notice that such was not his intention; and if the jury believe from the evidence in this case that the plaintiff, when he went on the boat, had not given any notice to the defendant that he was not going as a passenger on the boat, the defendant has a right to presume he intends to go on as a passenger, and all that the defendant was liable to do was to see that the plaintiff was safely and properly on the boat, and that when on, it was no negligence on the part of the defendant if the staging was pulled in, or no bell was rung warning the plaintiff to leave.

"6. The defendant, as a common carrier, is bound to give all passengers getting on or off its boat a safe and proper mode of ingress or egress; but the presumption of law is, unless the defendant is notified to the contrary, that a person who goes on board of the boat at any of its usual stopping places, where the boat takes on freight and passengers, goes on as a passenger, and that the liability of the defendant is at an end when the passenger is safely and properly on the boat, and that it is no negligence on the part of the defendant not to give warning, either by blowing the whistle or ringing the bell, to any person who came on the boat not intending to take passage on the same, nor is it negligence on the part of the defendant not to have a staging out in order that such a person can leave the boat in that manner."

The jury returned a verdict for plaintiff, assessing his damages at \$500, and judgment was entered accordingly. The defendant thereupon took this appeal.

BILLINGS & WISE, for the appellant.

L. & L. DAVIS, for the appellee.

Breese, Ch. J.—This was an action on the case, brought to the Alton City Court by John Henry, against the Keokuk Packet Company, for an injury alleged to have been occasioned by the carelessness and negligence of the defendants.

A verdict was found for the plaintiff, which the court refused to set aside, and rendered judgment thereon.

To reverse this judgment, the defendants appealed to this court, assigning as error, the refusal of the court to set aside the verdict as being contrary to the law and the evidence ; giving improper instructions for the plaintiff, and in refusing defendants' instructions, and in modifying the fourth instruction asked by them.

The verdict was one, we do not think, as we understand the evidence, we would have been willing to have rendered, believing the weight of it, when carefully considered, preponderates in defendants' favor, but, perhaps, not so greatly as to justify the interference of this court. It was conflicting, and brings the case within the rule so often declared by this court. *Morgan v. Ryerson*, 20 Ill. 343 ; *Bradley v. Geiselman*, 22 Id. 494 ; *Wallace v. Wren*, 32 Id. 146.

The instructions for the plaintiff were six in number, of which the second and sixth were erroneous and should not have been given. The second omits a very important element, and that is, the consideration of the plaintiff's own conduct as to caution and circumspection on his part in getting off the boat. Although the boat was violating the law by racing with another boat, and by reason thereof its stoppage at the usual landing place was abridged, so that the plaintiff had not a reasonable time allowed him to leave the boat in the usual manner by the staging, still, that did not relieve him from the duty of exercising proper care and prudence in leaving the boat. If the plaintiff was guilty of negligence, he cannot recover unless that of the defendants was greatly in excess and, therefore, the omission of that element in the instruction vitiated it.

The sixth instruction was this: "If the jury believe from the evidence, that the boat was in motion, and the stagings were on board or being drawn on, and that it would have been as dangerous for the plaintiff, under the circumstances, to get off the boat by the way of the staging, as it was in getting off the way he did, they will find for the plaintiff as to that fact."

We cannot but think this instruction misled the jury. It tells them to find for the plaintiff, if the plaintiff could not get off by the staging without injury to himself; then he was not culpable, no matter how dangerous the mode he adopted for getting off may have been. His clear duty was to use proper care and prudence in his effort to leave the boat. If there were hazard and danger

in one mode, and in that which he adopted, he should not have adopted it. Had the gang-plank or staging been drawn in, so that he could not leave the boat had he made known his wish to leave, which he did not, he had no right to risk his life or limbs by jumping off the boat in the manner he did. The gang-planks were not drawn aboard, but the shore ends were within a few feet of the land; the boat had not moved from the landing; the plaintiff made known to no person his desire to leave, but of his own impulse, and with great confidence in himself, imprudently jumped from the boat to the land. We think this instruction must have contributed very much to the finding of this verdict, and as we cannot see from the whole record that justice has been done, we must reverse the judgment and remand the cause, that a new trial may be had, and such instructions given as will not be inconsistent with this opinion. The defendants' fifth and sixth instructions were properly refused, there being no such presumption as therein claimed.

Judgment reversed.

THE CHICAGO & ALTON RAILROAD COMPANY v. RANDOLPH. (1)

Supreme Court, Illinois, January, 1870.

[Reported in 53 Ill. 510.]

PASSENGER JUMPING FROM FREIGHT TRAIN AT SUGGESTION OF CONDUCTOR NOT RELIEVED FROM NEGLIGENCE.—

Where a passenger boarded a freight train without attempting to ascertain whether it would stop at the station he desired, and for which he had bought a ticket, and was told by the conductor that the train would not stop, but that it would slow up, and when the train was running slowly told the passenger it was the right time to jump and the passenger did jump and was injured, it was error for the court to refuse to charge that what the conductor said did not release the plaintiff from the duty of exercising reasonable judgment as to whether it was safe to get off or not.

PASSENGER ON FREIGHT TRAIN MUST CONFORM TO USAGE.—

Railroad companies are not compelled to carry passengers on their freight trains, but they may, and if a passenger takes passage on one of them that was not accustomed to stop at his destination, he would not have a

1. Cited in *O. & M. R'y Co. v. Stratton*, 78 Ill. 88, 2 Am. Neg. Cas. 602.

right to insist, without an agreement, that the train be stopped there, although he had a ticket for that station and it was taken up by the conductor, nor has he a right to insist that he be carried through without charge.

APPEAL from the Circuit Court of Logan County. The facts appear in the opinion.

A. W. CHURCH, HAY, GREENE & LITTLER, for appellant.

WELDON, TIPTON & BENJAMIN, for appellee.

Walker, J.—This action was brought by appellee, in the Logan Circuit Court, against appellants, to recover for damages received by him while leaving appellant's train of cars, about the 21st of September, 1868. It appears that, on the evening of the day the injury was received, appellee procured a ticket at Lincoln for the station at Atlanta, and got upon a freight train while it was still in motion, the employees not intending to stop at the station at Atlanta. There was another passenger got on the train at the same time, who was going to the same place. The train was a through stock and freight train, which stopped regularly at certain stations for fuel and water, but not at others, unless signaled to do so to take stock from them or where there was freight to be delivered.

There is no evidence as to whether appellee made any inquiry, when he purchased his ticket, to learn whether the train would stop at Atlanta. Appellee, and the other passenger who got on the train at the same time, both swear that before leaving Lincoln, the conductor informed them that it would. This is denied by the conductor, who swears he was not in the caboose while at Lincoln, and not until they reached Lawnsdale, when he took up the tickets of appellee and the other passenger, when, he swears, he informed them the train would not stop at Atlanta, unless there should be stock at that point for shipment, but that he would run very slowly on the grade south of Atlanta, where they might jump off safely, if they chose, which they agreed to do. The conductor seems to be corroborated in his statement by the brakeman and another passenger on the train.

It appears that, when the train reached the grade and was running slowly, the conductor informed appellee and the other passenger for Atlanta, that then was their time to leap from the train, which they refused to do, whereupon they were informed

that the train would not stop. On reaching that point both men went out on the platform, and appellee leaped from the train, and in falling injured himself, but the other passenger remained on the train and was carried to the next station, where he was put off without injury. On a trial in the court below appellee recovered a verdict for \$1,200, upon which judgment was rendered, and the case is brought to this court on appeal, and various errors are assigned.

It is contended by appellee that he leaped from the train under the orders of the conductor; but on the other side it is denied that the conductor gave any such orders, or that he, at that time, even made any suggestion that he could or might leap from the train in safety. On the trial appellants asked this instruction, but it was refused:

"The court further instructs the jury, for the defendant, that even if the jury should believe, from the evidence, that the conductor or brakeman told the plaintiff, at the time he jumped off the train, that he could do so with safety, and yet left it voluntary with plaintiff to get off or not, then what the conductor or brakeman might have said at the time (if the jury believe, from the evidence, anything was said by them) did not release plaintiff from the duty of exercising reasonable judgment and caution as to whether it was safe to get off or not. If the jury believe, from the evidence, that, under all the circumstances existing at the time, a man of ordinary prudence, situate as the plaintiff was, would not have jumped off, the jury should find for the defendant."

It is urged that it was error in the court to refuse this instruction.

In the conflict in the testimony, this instruction should have been given. If the conductor only gave it as his opinion that appellee could leap from the train in safety, and appellee acted on his suggestion, still it was his duty to exercise his judgment whether or not it was safe. And if the conductor only gave it as a matter of opinion, still, if the danger was so apparent that a prudent man, similarly situated, would not have attempted to leap from the train, then appellee was guilty of negligence, and should not be permitted to recover. He was bound to exercise ordinary prudence, if left to act voluntarily, and was not acting under con-

straint. The instruction only asserted these propositions, and it should have been left to the jury to determine whether appellee was under constraint when he leaped, and if not, whether he acted with ordinary prudence.

It is also urged that the court erred in refusing to give appellant's tenth instruction, which is this :

" If the jury believe, from the evidence, that the train in question sometimes did and sometimes did not stop at Atlanta, and that this was known to the plaintiff before getting on said train, or before the same left Lincoln, then it was the duty of the plaintiff to ascertain, from some one authorized person, before becoming a passenger, whether said train would or would not stop at Atlanta on the trip in question. And if the jury believe, from the evidence, that the plaintiff got on said train, knowing such stoppage to be uncertain, then the defendants were not bound to stop said train at Atlanta for his accommodation, and the taking of plaintiff's ticket by the conductor did not constitute a contract to stop at Atlanta."

No one will question the legal right of a railroad company to appropriate a portion of their trains exclusively to the carrying of freight, and to entirely exclude passengers from such trains. Their obligations to the public only require them to furnish sufficient passenger trains to accommodate the travel, and such freight trains as the business of the country along their line requires. They are not required to carry passengers on their freight trains, or freight on their passenger trains. But they may, if they choose, do either. It then follows, that when a passenger purchases a ticket, he only acquires the right to be carried according to the custom of the road. When he obtains a ticket, he has a right to go to the place for which it calls, on any train that usually carries passengers to that place. But he does not acquire the right to insist that the company shall send him on a special train, or out of the customary course of their road.

When a traveler obtains such a ticket he should inform himself as to the usual mode of travel on the road, and so far as the customary mode of carrying passengers is reasonable, he should conform to it. These companies have passenger trains that only stop at the principal stations on their roads, and the right, so far as we know, has never been challenged when they furnished a

reasonable number of other trains, stopping at all stations, to accommodate public travel. And when a person purchases a ticket he should ascertain whether the train will only stop at the principal stations or at all of them before he gets on a passenger train, and were he to get on one that was not accustomed to stop at the station to which he desired to go, he would not, without an agreement to stop, have any right to insist upon the company's changing the course of their business for his accommodation. The requisite information can always be had from the agent when the ticket is procured, and it is but reasonable to require passengers to obtain the information and to act upon it.

If, then, the company may run passenger trains that only stop at designated stations, furnishing reasonable means for carrying passengers to all their stations, it is more reasonable that they may run freight trains which only stop at certain stations for fuel and water, or at such other stations as the transportation of stock or freight may require. And it is but reasonable that the company may exclude all passengers from such trains, or only carry them to the places at which they are accustomed to stop; and if a person gets upon such a train without any agreement that they will stop at an unusual place of stopping, he cannot require the company to change the usual course of their business for his accommodation and to serve his convenience. Should a person get on such a train without the consent of the employees of the road, the taking up of his ticket, merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place. In such a case the passenger is in the wrong, and has no right to insist that he should be safely put off at the point he desires, or be carried through without charge. The instructions are in harmony with these views, and should have been given. For the refusal to give these instructions the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

**THE TOLEDO, WABASH & WESTERN RAILWAY
CO. v. BADDELEY. (1)***Supreme Court, Illinois, January, 1870*

[Reported in 54 Ill. 19.]

RAILROAD COMPANY LIABLE FOR INJURY TO PASSENGER WHEN INSUFFICIENT TIME GIVEN TO ALIGHT.—Railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time tables do not allow sufficient time for this purpose and an injury is thereby occasioned, the company will be liable therefor.

MEASURE OF DAMAGES—IMPAIRMENT OF MENTAL FACULTIES MAY BE CONSIDERED BY JURY.—Whether the mental faculties of a passenger, who was injured through the negligence of a railway company, were impaired by the accident, is a legitimate subject of inquiry for the jury in estimating the damages, and this without reference to the question whether the act was willful.

WRIT of Error to the Circuit Court of Ford County. The facts appear in the opinion.

A. E. HARMON and WM. E. NELSON, for plaintiffs in error.

LANGLEY & WOLFE, for defendant in error.

Breese, Ch. J.—This was an action on the case, against a railroad company to recover damages for an injury to the plaintiff, a passenger on the train, occasioned by the negligence of the company, and a verdict for plaintiff of \$10,000, one-half of which was remitted by the plaintiff, and judgment entered for \$5,000.

The defendants bring the record here, by writ of error, assigning various errors.

The first relates to the refusal of the court to exclude the deposition of the plaintiff, for the reason, it was taken before a notary public. This is not a valid objection to the deposition, inasmuch as, by the third section of Ch. 76, entitled, "Oaths and Affirmations," express power is given notaries public, "to take affidavits and depositions concerning any matter or thing, process or proceeding, depending or to be commenced in any court or before any justice of the peace, or on any occasion wherein such affidavits or depositions are authorized or required by law to be taken." R. S. § 393.

1. Cited in *C. & A. R. Co. v. Byrum*, 153 Ill. 131, 2 Am. Neg. Cas. 719.

That this power is plenary, so far as notaries public are concerned, cannot be questioned, and the practice has been uniform and unchallenged throughout the State, to take depositions before such an officer.

Another reason for excluding this deposition was urged, that the notice to take it did not show that the witness was a resident of a different county from that in which the court was held.

The notice, as appears by the record, has the venue, Ford County, that being the county in which the suit was pending and to be tried, and notifies defendant that the deposition will be taken at the residence of the plaintiff, in Champaign City, Illinois, on a day named. This is a sufficient compliance with the statute, as it gives "time and place." As the action was brought in Champaign County, the inference would be fair, that was the county of plaintiff's residence, and it is a county different from the one where the suit was pending.

The objections to particular interrogatories, and the answers thereto, were properly disposed of by the court; and here we may say, it is not the proper practice to make objections to depositions on the trial of a cause as these appear to have been made. They should be made and disposed of before the trial, in order, if defective, the party taking them may have an opportunity to remedy the objections, and, for such purpose, ask a continuance.

As to the merits of the case, the testimony is very conflicting indeed, on the strength of which, the jury would have been warranted in coming to a conclusion against the plaintiff, and, had they done so, the court would hardly be justified in setting the verdict aside as being against the weight of evidence. There are numerous cases in this court to that effect.

As this court said in *Crain v. Wright*, 46 Ill. 107, and in many other cases, where the evidence is conflicting, it is the duty of the jury to reconcile it so far as it can reasonably be done, and so far as it is irreconcilable to reject such as they may believe, from all the circumstances, was the result of mistake or misapprehension or from other causes is not reliable, and to give credit to such as they believe to be true. Juries see the witnesses, and from their manner, their intelligence and opportunities of being informed, can determine the weight their evidence should receive, and unless

it is clear the jury have mistaken the weight of the evidence, and their verdict is manifestly against it, this court will not interpose to set aside a verdict and reverse the judgment rendered upon it. *Voltz v. Stephani*, 46 Ill. 54, is to the same effect, and it has long been the settled doctrine of this court.

We cannot say, in this case, the jury have mistaken the weight of the evidence, and consequently cannot disturb the verdict.

An objection was made by the defendants on the trial to a question to this effect, put to the attending physician of plaintiff: "Have these injuries affected the mind of the plaintiff?"

It is insisted by defendants, that, as the act was not willfully done, the mere mental suffering from it forms no part of the actionable injury, citing a note in 2 Greenl. on Ev. § 267. The authority referred to by the author of that treatise is *Flemington v. Smithers*, 2 Car. & P. 292. In the text, the author says: Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or *mental*, and in the expenses and loss of property which they occasion; and the jury, in estimating damages, may consider, not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily suffering, and, if the injury was willful, his mental agony also.

It will be perceived the question put has no reference to this effect upon the mind. Mental suffering, such as a person is supposed to undergo when writhing under the infliction of a willful injury, is not involved in the question. The answer of the witness shows he did not so understand it, for he says:

"Yes, sir; so much so, he is almost incapacitated from doing anything at all; at this time he cannot recollect anything more than ten minutes; at times he loses his mind entirely." The effort was to show by this witness the shock to plaintiff's system by the fall, and consequent amputation of his arm, was so great as to deprive him, in a great measure, of mental power, and this was a legitimate subject of inquiry. In the opinion of this witness, the injury was permanent, and of a most serious and distressing character.

This question was followed by another, to which objection was made. It was this: "What will be the effect of these injuries on his future condition?" The answer was, "I think it will result in death before many months; he may live one year."

Defendants insist that no man, physician or otherwise, can tell what the future condition of an injured person will be. This may be true, and this physician did not pretend to say what his future condition would certainly be—he merely expressed an opinion on the facts, on the medical knowledge he had, and of physiology. He was a physician of years' practice, and must have been quite ignorant if he could not form an opinion on the probable effect of such injuries on the human system. It may be he was mistaken, but his opinion on the subject was proper for the consideration of the jury.

All the evidence of this character objected to by defendants was admissible under the declaration, to the benefit of which the plaintiff was entitled. 1 Ch. Pl. 398; *Frink v. Schroyer*, 18 Ill. 416; *Slater v. Rink*, 18 Ill. 527, and many other cases to the same effect.

An objection is made to the instructions given for the plaintiff, especially the second, in which the jury are told these companies must exercise extraordinary care. It is said the court did not explain to the jury what was extraordinary care, leaving it to each juror to put his own construction on the phrase. We think this objection is rather hypercritical. Had the court used the phrase, the strictest care, or any other phrase implying a care more than ordinary, no one would think the court should give an explanation of it. So, where the phrase, extraordinary care, was used, the jury could not fail to see that something more than ordinary care was required, something extra, beyond that degree. It does not differ from the phrase, greatest care, utmost care, the highest degree of care, and so the jury would understand it.

The fourth instruction given for plaintiff is objected to. It was this :

"The jury are further instructed, that a passenger is entitled to a reasonable time to leave the car in which he has been riding when a train is stopped for that purpose, and what will constitute a reasonable time depends upon the age and physical condition of the passenger, as well as the time, place, and facilities for getting off the train, which the jury are at liberty to consider, in determining whether or not such reasonable time has been allowed."

If the instruction was designed to be understood that the age

and decrepitude of a passenger must determine the time of the stoppage of a train on its arrival at a station, it would be objectionable, but it is not to be so understood: Its extent is, that railroad companies must afford a reasonable time to passengers, whether young or old, to leave the cars in safety, and if the time tables do not allow sufficient time for this purpose, and an injury is thereby occasioned, the company would be liable therefor.

The eighth instruction given for the plaintiff is objected to, on the ground that the mental suffering of the plaintiff was not a proper element to enter into the consideration of the jury, the injury not having been willful.

There was no evidence before the jury of mental suffering by the plaintiff. The proof was, that his mind was almost totally destroyed, and it must have been in view of such a condition the jury received the instruction. They could not have been misled by the language in which the instruction was couched. And, as given, it was more favorable to the defendants than if the attention of the jury had been called to the fact of an entire breaking up of that most important faculty, on which human happiness so much depends.

There is no argument upon the point that the damages are excessive, and we forbear touching that subject.

Perceiving no error in the record which would justify us in reversing the judgment, the same must be affirmed.

Judgment affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY v. SLATTON. (1)

Supreme Court, Illinois, June, 1870.

[Reported in 54 Ill. 133.]

RAILROAD COMPANY NOT LIABLE FOR DEATH OF PASSENGER WHO DOES NOT LEAVE TRAIN UNTIL IT BEGINS TO MOVE.—Where it appears in an action for damages for the death of a passenger that the train had remained at a station a sufficient length of time for the passenger to alight safely, but deceased did not avail himself of this opportunity, but waited until the train was again in motion, and

1. Cited in *O. & M. R'y Co. v. Stratton*, 78 Ill. 88, 2 Am. Neg. Cas. 602; *C. & N. W. R'y Co. v. Scates*, 90 Ill. 586, 2 Am. Neg. Cas. 623.

without the direction or knowledge of the employees of the railroad attempted to get off the train, and did so, but clung to the railing of the car, and by so doing was dragged under the car and fatally injured, the railroad company is not liable.

APPEAL from the Circuit Court of Perry County. The facts appear in the opinion.

GEORGE W. WALL, for appellants.

EDWARD V. PIERCE and WILLIAM M. CHRISTIAN, for appellee.

Breese, J.—This was an action on the case brought to the Perry Circuit Court, by Susan Slatton, administratrix of the estate of John W. Slatton, against the Illinois Central Railroad Company, to recover damages for having caused the death of the intestate, by the negligent management of a train.

There were two counts in the declaration, one alleging that while deceased was using due care when alighting from the train at Tamaroa, the train was suddenly and violently started forward, by means whereof deceased was thrown under the wheels, and injured so that he died.

In the other count it is alleged, that, as deceased was about to alight from the train, using due care, he was violently pushed off by the servants of the company in charge of the train, whereby he was thrown under the wheels, receiving a fatal injury.

The general issue was pleaded and the cause tried by a jury, who found for the plaintiff, and assessed the damages at \$1,166.

A motion for a new trial was overruled, and judgment rendered on the verdict, to reverse which the defendants appeal.

There was much testimony heard, and, as usual in such cases, not entirely harmonious.

The rule of law need not be repeated, that, to justify a recovery in this action, the allegations of the plaintiff must be sustained by the evidence; and when the evidence is conflicting, the verdict must stand, unless it shall appear that, although it is conflicting, the weight is decidedly in favor of the defendant.

The first count charges as negligence on the part of the defendants, that while deceased was leaving the car, using due care, the train was suddenly and violently started forward, by means whereof he was thrown under the wheels, and so injured as to cause his death.

It cannot be claimed that the evidence tends, in the slightest,

to substantiate this charge—no witness has spoken to that point, consequently, these allegations are not sustained.

The second count charges that the deceased was violently pushed off the train, by the servants of the defendants in charge of the train, whereby he was thrown under the wheels, and was injured fatally.

The case was put to the jury mainly on this count. The theory of the plaintiff evidently was, that some employee of the company used force in putting the deceased off the train while it was in motion, and it was so put to the jury by the first instruction asked by the plaintiff.

If there existed reasonable grounds for the hypothesis of the second count, the civil authorities, indeed, the whole people of Tamaroa, were greatly remiss in their duty, in not pursuing the offender in order to his prompt punishment, for it was murder, most foul and terrible. It cannot be possible that such a fiend was employed by this company in their service.

John W. Parlier, in his testimony, gives some color to this theory, and so does Robert Murray, a lad about sixteen years of age when the accident occurred, in a slight degree, when he says there was some man on the car platform behind deceased; thought it was some man belonging to the train—the brakeman or conductor; did not see him after deceased fell; when he first saw deceased, he was standing with one foot on the car steps and one foot on the station platform, with one hand on the railing; the man had on a cap; did not see any badge on it; thought he was a brakeman or conductor; had seen him pass through on the train before, several times; he (the man) was standing on the car platform; did not say or do anything to the deceased; saw deceased get off; thought he had one foot on the platform of the station; the train had moved eighteen or twenty feet. On his cross-examination, he says the man was a low, heavy-set man; he also says there were two cars behind the one he (meaning, evidently, the deceased) was on, and another, which would make three cars, when the proof is overwhelming, deceased came out of the car next forward of the last car.

It is fully proved that no employee on the train could have interfered with the deceased in any particular unless, possibly, Glassford, who states he did leave his station, which was on the

front end of the last car, and got out on the station platform at Tamaroa, and passed through one or two cars to regain his position, and he testifies he did not see or touch any soldier getting off, nor say anything to anyone of them who got off at Tamaroa, and knew nothing of the occurrence until he was told of it by a soldier.

The second witness for plaintiff, Mr. Corgan, gives a very full and clear account of the occurrence, of which he was an eye-witness. He says he saw the deceased when he was injured; was within fifteen feet of him; was on the platform opposite to him, about six feet from him, when he fell; he was in the car with the soldiers; saw him when he came out of the car; seemed to be feeble and held onto the railing of the car; as he came out of the car door a man took hold of his arm, apparently for the purpose of helping him off; he seemed to be aiding the deceased and helping him to get off; saw no badge by which to distinguish him as belonging to the railroad; saw him open the door and assist deceased to get off; deceased was holding onto the railing, and was holding onto it when he fell; train was moving slowly when he came out of the car; seemed to be just starting when he came out; it was about noon. On his cross-examination, he says there was nothing unusual about the conduct of the train, except that there was a large crowd of people on the platform; saw James, the brother of deceased, same day; when he first saw deceased he was inside of the car; saw some man helping him who appeared to be friendly; deceased stepped down the steps, holding onto the railing with his hands, and got both feet on the station platform; he would not have got hurt if he had not held onto the railing after he got off the steps; held onto the railing with both hands; was pulled along twelve or fifteen feet, when he fell down; think both feet were on the station platform.

In connection with this testimony, and strongly corroborative thereof, is the evidence of D. C. Barber, a witness for the defense, and known as a prominent and intelligent citizen of Tamaroa. He says he saw deceased the day he was hurt; saw the occurrence; the train stopped some time; the soldiers were getting off and meeting friends, and there was a good deal of bustle; saw the man coming out of the car door; one or two men in the garb of soldiers were helping him, as he seemed to be feeble; he

stepped onto the steps, and then got onto the platform; he held on to the railing too long and was dragged some distance before he fell; witness started to catch him, but he lost his hold before witness could get to him; his head was struck by the steps, or some part of the train, after he fell; in trying to rise, his leg got under the car and was crushed; saw him when he came out on the platform; soldiers were helping him and had hold of him; the train was in motion, and he would not let go of the railing, and was dragged down; don't know who the persons were who were holding him; they were dressed as the other soldiers; he was stepping down the stairs very carefully; heard no remark made to him; saw no one push him or shove him; all that was done seemed to be with a friendly design; thinks they had their hands under his arms to help him.

On his cross-examination, he says he was standing on the depot platform; two persons seemed to be assisting deceased; judged they were soldiers, from their garb; deceased stepped onto the platform with his feet; his feet got on the platform (station), and by reason of his holding on to the railing, he was dragged along and pulled down; it was the noon train, going south; was there when the train came up, and it stopped longer than usual; a good many got off, and friends were meeting them; did not see any badge on the caps of the soldiers or persons who were helping the deceased.

This testimony of Mr. Corgan, the plaintiff's witness, and Mr. Barber, the defendant's witness, explodes the theory that deceased was improperly dealt with by the employees of the company, and is at variance with that of Mr. Parlier, who says he thinks deceased did not have hold of the railing when he tried to get off the car.

In addition to this is the testimony of Ezra Woods, on the part of the defense. He says he saw the accident; when coming back from the baggage and express car he saw deceased coming out on the car platform; saw him stepping off the steps of the car onto the depot platform; and just as he fell, Porter, who was beside witness, said "Look there"; first noticed deceased when he was stepping down the steps; he had his hands on the railing; the train was just moving at the time, very slowly; knew the brakemen and trainmen; saw no one touch deceased; several

soldiers were on the platform at the time; witness was standing where he could see; did not hear anyone say anything to him; train stopped longer than usual—two or three minutes.

On his cross-examination, says when he first saw deceased he was going down the steps; he had hold of the railing; could not say that his feet struck the platform; had hold of the railing as he fell.

George W. Kenney testified he was on the platform when the train arrived; it stopped from two to five minutes—longer than usual; saw deceased when first standing on the car platform; was coming out of door; did not know he was going to get off the train until he struck the station platform; saw him at that time plainly; saw no one, or heard anyone say or do anything to him; three to five soldiers on same platform of car; he stepped on the steps, and had hold of the railing with his hands when he stepped on the first step; saw him get on the station platform with his feet, but he still held on to the railing of the car, and the train dragged him from six to eight feet; the train had just started when witness first saw him; heard no one say or do anything to him; saw him after the train had passed; was the second man that took hold of him.

Henry Clay saw the accident; train stopped longer than usual; saw the man that was hurt; his impression is the man was on the platform when the train started; remarked to someone, when witness saw him "scrambling" and clinging to the rail, that he was sick and would get hurt.

It was agreed by the parties that Nelson Holt, the station agent, who was absent, would testify, if present, that he had a fair opportunity of seeing all that happened; that he knew the employees of defendants as were at the time running on the passenger trains passing Tamaroa; that the train in question stopped at the station more than the usual length of time, and long enough to enable passengers to get off; that deceased was not thrown or pushed off, or negligently jostled off by any brakeman or other person employed on that train; or, if done, witness did not see it.

We think this testimony overthrows the theory on which this case is based, and is so overwhelmingly in favor of the defense as to demand from the jury a favorable verdict.

The evidence recited satisfies us that deceased had got onto the station platform, and still clung to the railing of the car steps, and by so doing was dragged to his death. This was no fault of the company. No negligence can be imputed to them, unless it be shown that by bad management of the train, or careless conduct of their employees, deceased was placed in a perilous situation. The proof is abundant that the train stopped an unusual time—for a time sufficient to enable the passengers to leave it safely. If the deceased did not avail of this opportunity, but chose to attempt to get off when the train was again in motion, and this without the direction or knowledge of any employee on the train, it was his folly, and the consequences of it must rest upon him alone.

The testimony so greatly preponderating in favor of appellants, the verdict should have been in their favor. The court should have set it aside on the motion for a new trial. It was error to refuse the motion.

For this error the judgment is reversed and the cause remanded.

CHICAGO & NORTHWESTERN RAILWAY CO. v. FILLMORE.

Supreme Court, Illinois, September, 1870.

[Reported in 57 Ill. 265.]

RAILROAD BRIDGE OVER STREET SHOULD BE KEPT COVERED.

—In an action for injuries occasioned by falling through an uncovered bridge while the plaintiff was attempting to board a train, an instruction that as matter of law the railway company was not bound to cover and keep covered the bridge or track over the road or sidewalk where the injury was caused, was properly refused.

DECLARATIONS OF CONDUCTOR OF TRAIN WHEN INADMISSIBLE.—The declarations of the conductor of the train, made after the accident, that tend to show that the company was negligent, are inadmissible.

APPEAL from the Circuit Court of McHenry County.

Action brought by Fillmore against the Chicago & Northwestern Railway Company to recover for injuries to the plaintiff, occasioned by the alleged negligence of the defendants. The plaintiff recovered a verdict, upon which judgment was rendered. The defendants appeal.

A. M. HERRINGTON, for appellants.

BLANCHARD & SILVER and JOSLYN & SLAVIN, for appellee.

Thornton, J.—On the 12th of October, 1868, appellee, in attempting to get on the train of the railway company at its depot in Elgin, fell through an uncovered bridge, which was under the control of appellants, and was seriously injured.

As the case must be reversed, we shall not discuss the negligence of the one party or the other.

There was error in allowing the declarations of the conductor of the train, made after the accident had happened, to be introduced to the jury. He was a competent witness, and should have been called by appellee. The danger of the bridge and the responsibility of the company, as connected therewith, were to be determined by the jury from the evidence. Whatever knowledge the conductor had as to the condition of the bridge at the time should have been stated by himself. His statements tended to show that the company were negligent. They were but hearsay evidence, and wholly incompetent.

The instructions given were correct. The instruction refused, and of which appellant complains, is as follows:

"The court instructs the jury, as matter of law, that the defendant was not bound to cover and keep covered the bridge or track over the road, or sidewalk, where the injury was caused."

This instruction was properly refused. The bridge in question was thirty or forty feet long, and sixteen feet high. It was in the limits of a city, and over a public street in the immediate vicinity of the railroad. It had been covered by appellants, but was uncovered at the time of the accident, for repairs. Soon after the injury, it was re-covered by appellants. Appellee, in attempting to get upon the car, at the hour of midnight, fell through this bridge. It should have been covered, or so protected, if uncovered for repairs, as to prevent such injuries. Railway companies, in the enjoyment of their franchises, and the performance of their duties, should have a proper regard to the safety of persons whom they invite to their depots. They should omit no act, the omission of which would endanger the limbs or lives of those who seek to ride upon their trains.

The injury to appellee was of a serious and permanent character. He is a cripple for life. He has suffered pain and anguish,

and been involved in large expenditures of money. The evidence, however, fails to disclose any wantonness or willfulness on the part of the company; and therefore we cannot appreciate the motives which induced the finding of the jury. The verdict was for \$25,000. There is no foundation in the evidence for the damages awarded. In case of death, our statute only allows \$5,000, for negligent acts, however gross.

For a similar injury, inflicted by an individual, no jury would find such a verdict. However reluctant to disturb the verdict of a jury for such cause, we must pronounce the damages allowed as grossly excessive. We shall always hold railway companies to a full accountability for all damages from wrongful acts; and at the same time guard them from being made victims of popular prejudice.

The judgment must be reversed and the cause remanded.

ILLINOIS CENTRAL RAILROAD CO. v. ABLE. (1)

Supreme Court, Illinois, June, 1871.

[Reported in 59 Ill. 131.]

PASSENGER CARRIED PAST STATION.—A passenger who is carried past his station without his consent has an action against the railroad company for damages.

LEAPING FROM RAPIDLY MOVING TRAIN.—If a passenger voluntarily leaps from a rapidly moving train and is injured he cannot recover.

PASSENGER ALIGHTING FROM MOVING TRAIN AND INJURED MAY RECOVER WHEN STOP AT STATION WAS MOMENTARY.—If a passenger attempts to alight after a train has increased its speed, the train having halted at a station for a moment only, and the passenger is injured, he can recover for the injuries sustained, as the momentary halt of the train was an invitation to alight and the company is responsible if it did not furnish reasonable time to leave the train with safety.

APPEAL from the Circuit Court of Effingham County. The facts appear in the opinion.

GEORGE W. WALL, for appellant.

1. Cited in Ill. Cent. R.R. Co. v. Lutz, 84 Ill. 598, 2 Am. Neg. Cas. Chambers, 71 Ill. 519, 2 Am. Neg. 613; C. & A. R. Co. v. Byrum, 153 Cas. 597; Ill. Cent. R.R. Co. v. Ill. 131, 2 Am. Neg. Cas. 719.

O. B. FICKLIN, JOHN SCHOLFIELD, and WOOD & BARLOW, for appellee.

Lawrence, Ch. J.—If a railway passenger, holding a ticket entitling him to alight at a particular station, is carried past such station without his consent, and without being allowed a reasonable opportunity of leaving the train, he has an action against the company for whatever damages may have accrued to him for non-delivery at the place of his destination. But, on the other hand, if he voluntarily leaps from the train when in rapid motion, or leaves it under circumstances which would necessarily or probably render such an act perilous, and receives bodily injury, he could not recover damages for the injury, because it would be the result of his own want of ordinary care. Cases might occur, however, in which a reasonable opportunity to alight has not been given to a passenger, and where he attempts to do so after the train has resumed its motion, but before the motion has become at all rapid, and the stepping from the train would not seem dangerous to a man of ordinary prudence and judgment, and nevertheless bodily injury follows. In such cases the passenger would be entitled to recover damages for the injury, because the railway company has committed a flagrant breach of duty, and the passenger is chargeable with no appreciable negligence. He has a right to construe the momentary halt of the train at the station as an invitation to alight, and to make use of the opportunity thus afforded, where not attended with apparent danger, holding the company responsible if it does not furnish reasonable time to leave the train with safety.

The action of the court in giving, refusing and modifying instructions was in substantial accordance with these principles.

It is urged, that the verdict is not sustained by the evidence, but we refrain from the consideration of that point, as there is another upon which the case must be sent to another jury. It appears, by the affidavit of the officer having in charge the jury, that after agreeing to find for the plaintiff, they differed widely as to the amount of damages, and it was then agreed that each juror should privately write upon a slip of paper the amount of damages to which he thought the plaintiff entitled, and place the slip in a hat; that the amounts should then be added together,

and their sum divided by twelve should be the verdict. This was done, and a verdict returned accordingly.

It is true, a juror swears that there was considerable consultation after this was done, and that each juror agreed upon the result thus reached, as his verdict. He does not, however, deny that an agreement was made, such as is stated in the officer's affidavit, and we cannot doubt it was that agreement which controlled the amount of damages. The rule upon this matter is well settled. It is, that while jurors may resort to a process of this sort as a mere experiment, and for the purpose of ascertaining how nearly the result may suit the views of the different jurors, yet a preliminary agreement that such a result shall be the verdict, will vitiate a verdict found under and by virtue of such an agreement. *Dunn v. Hall*, 8 Blackf. 32; *Dana v. Tucker*, 4 Johns. R. 487; *Harvey v. Rickett*, 15 Johns. R. 87.

This rule is so reasonable as to need no comment.

As this verdict was evidently found under the pressure of such an agreement, the judgment must be reversed and the cause remanded.

THE ROCKFORD, ROCK ISLAND & ST. LOUIS RAILROAD COMPANY v. COULTAS.

Supreme Court, Illinois, January, 1873.

[Reported in 67 Ill. 398.]

CONTRIBUTORY NEGLIGENCE OF PASSENGER GOING ON PLATFORM OF CAR.—If a passenger goes out of a railway car upon the platform when a train stops at a dangerous place on a dark night without inquiring as to the danger, and while he is there, the train is started with a jerk and he is thrown off and injured, and had he remained in the car he would not have been injured, he is guilty of negligence and cannot recover damages.

APPEAL from the Circuit Court of Scott County. The facts appear in the opinion.

CHARLES N. OSBORN and N. M. KNAPP, for appellant.

ALBERT G. BURR, WILLIAM BROWN and H. CASE, for appellee.

Scott, J.—This action was brought to recover for personal injuries. Appellee was a passenger on a freight train on appel-

lant's road, and just before reaching the yards at East St. Louis it was signaled to stop. The point where it stopped was on the trestle work between the roundhouse and the yards. After the lapse of about ten minutes, appellee was in the act of, or had just stepped on the platform of the caboose car, when the train started up with a sudden jerk and he was thrown off the car on the trestle work and from thence fell on the ice below, a distance of twenty feet or more, and received the injuries complained of.

The negligence charged in the declaration, upon which it is sought to render the company liable, is, the train was started with a sudden jerk without any previous signal by sounding a whistle or ringing a bell, and that such conduct was grossly negligent. None other is alleged or proven.

It becomes a material inquiry, therefore, whose negligence caused the injury? Was it that of appellee, or was it that of the servants of the company?

There were in the "caboose," at the time the casualty happened, the brother of appellee, the conductor, and certainly one, if not two, brakemen, none of whom were injured. It is quite apparent, then, had appellee remained in his seat from three to five minutes longer, the accident would not have happened, for, in that space of time the train would have reached its destination in the yards at East St. Louis.

Was it prudent, or at all necessary, for him to attempt to go upon the platform? The excuse given for leaving his seat is, that he desired to relieve a want of nature. The reason assigned can hardly be regarded as a satisfactory explanation of his conduct. He must have known the train was about to enter the yards, and was at no regular station for passengers to get on or off. It was dark and cold, and it is perhaps true appellee did not know the extent of the danger he was about to encounter. This fact itself ought to have imposed upon him a high degree of watchfulness for his personal safety. The conductor was in the car with him, and it seems to us it was highly improper—if we characterize it by no stronger term—to attempt to go upon the platform in the darkness of night without asking the conductor whether it was prudent, or whether the train would stop long enough for him to do so with safety. If he did not know why the train was stopped or the length of time it would prob-

ably remain, he could have learned the facts by application to the conductor. This was his plain and reasonable duty.

It could not reasonably be insisted, the cause for which he says he desired to leave his seat in the car was so pressing he could not wait five or ten minutes until the train should reach its stopping place in the yards. The conclusion, therefore, seems almost irresistible, that, in going upon the platform without making the proper inquiries of the conductor, appellee was himself guilty of a want of ordinary care. No prudent man would do it. His experience on that train, if he had never been on any other, must have taught him the train was liable to be started suddenly, with a jerk more or less violent, and on the platform he would be in imminent danger of being thrown off.

The fact that appellee was guilty of some degree of contributory negligence raises the question of the comparative negligence of the parties.

We had occasion, in the recent case of the C. B. and Q. R.R. Co. *v.* Van Patten, 64 Ill. 510, to restate the doctrine of comparative negligence as held by this court in numerous cases. The principle, as there recognized, is, that although plaintiff himself may have been guilty of negligence, yet, if it is slight, and that of the party causing the injury gross in comparison, he may recover, notwithstanding his own negligence. But if plaintiff's negligence was the primary cause of the injury, and the defendant was guilty of no want of ordinary care, a recovery cannot be had.

In view of these principles we will consider briefly the conduct of the servants of the company.

The train was approaching the end of its route at East St. Louis and was within a few hundred yards of its stopping place. The evidence shows it was the duty of the engine driver to obey signals from those in the yards, whose duty it was to receive the train on its arrival. He received the usual signal to stop, and did so, and it became his duty to wait until he should get a like signal to go forward. The conductor had no duty to perform at that point in the management of the train.

The principal ground of complaint is, the engine driver started without giving signals of his intention by ringing a bell. It is very doubtful whether it was his duty to cause the bell to be

rung. It was at no station, and of what possible benefit could it be to passengers in the car. The train was on the trestle-work, where he knew passengers could neither get on nor off with safety, and he could have no reason to expect anyone was endeavoring to do so.

There can scarcely be a reasonable doubt the whistle was sounded. It is distinctly sworn to by the engineer, one brakeman and the conductor, and they all state such facts as make it almost impossible for them to be mistaken.

The engineer states he endeavored to start the train without taking up slack, but was unable to do so, and in this he is corroborated by the brakeman and the conductor, who distinctly noticed the fact. He then slackened up the train. This is done by setting the brakes on the rear car and then pushing the others back against it. The signal in use to indicate to the brakeman to set the brakes, is one sharp "toot" from the whistle, and to let them off so the train may start, the signal is given by two like sharp sounds. It is not probable the brakes could have been set except in obedience to the signal from the engine driver, and on a level road it would have been difficult, if at all possible, to slack the train had not the brakes been set. The evidence shows it would have been impracticable to start the train, coupled as it was, with a sudden jerk like that described by the witnesses, unless it had first been slacked. These facts show, beyond any reasonable doubt, the whistle was sounded. It is the usual signal for starting the train when not at a station, and was sufficient to have put appellee on his guard. The jerk given was not unusual on freight trains. It was a very long and heavy train, and the evidence shows conclusively, it could not have been started without slackening. This necessarily produces a jerk more or less sudden and violent. It is not easy for the engineer to gauge, accurately, the amount of steam necessary to move a heavy train. A little too much will cause a violent jerk. There is not a witness who declares the engine driver did not use care and skill in the effort to set the train in motion, or states facts from which negligence might be inferred. He gave the usual signal, viz.: sounding the whistle. He was not required by any rule of the company or any regulation necessary to the protection of the passengers, to ring a bell, and was guilty of no negligence in that regard.

The jury must have disregarded the evidence of the engineer, brakeman and conductor as to the degree of care used in the management of the train, and relied solely on the negative testimony of the brother of appellee and the brakeman, Rodecker. The evidence of appellant's witnesses was, in no way, discredited. There was, however, a cloud on the testimony of appellee's witness, Rodecker. A number of witnesses state his reputation for truth was bad, and his testimony, to say the least of it, was inconsistent in some of its parts. There was no valid reason for rejecting the evidence of so many unimpeached witnesses and relying solely on his. We have said, a jury ought not, arbitrarily, to reject the testimony of an unimpeached witness simply because they desire to find a verdict against it. It is their duty to consider the entire evidence and render their verdict accordingly. It should be a fair and just conclusion from the whole evidence.

In the view we have taken, the ends of justice will be subserved by submitting this cause to another jury, to be instructed on the question of the comparative negligence of the parties as that doctrine is laid down by this court in its previous decisions.

The judgment is reversed and the cause remanded.

ILLINOIS CENTRAL RAILROAD COMPANY v. CHAMBERS. (1)

Supreme Court, Illinois, January, 1874.

[Reported in 71 Ill. 519.]

NEGLIGENCE IN JUMPING FROM MOVING TRAIN.—If a passenger having a ticket entitling him to stop at a given station and, apprehensive that he would be carried past his station, jumps from a train while it is in rapid motion and is thereby injured, he is guilty of negligence that will prevent his recovering damages.

LIABILITY OF RAILROAD FOR CARRYING PASSENGER BY STATION.—If a passenger holding a ticket entitling him to alight at a particular station, is carried past such station, without his consent, and without being allowed a reasonable opportunity to leave the train, he has an action for any damage he may sustain thereby.

1. Cited in *C. & N. W. Ry Co. v. Scates*, 90 Ill. 586, 2 Am. Neg. Cas. 623.

APPEAL from the Circuit Court of Coles County. The facts are stated in the opinion.

GEORGE W. WALL, and WILEY & PARKER, for appellant.

FICKLIN & FRYER, and JUSTICE W. CRAIG, for appellee.

Breese, Ch. J.—This was an action on the case, in the Coles Circuit Court, to recover damages alleged to have been received by the plaintiff, occasioned by the negligence and mismanagement of the defendant, a railroad corporation, whilst the plaintiff, a passenger on the train, was leaving it. The trial resulted in a verdict for the plaintiff, on which the court rendered judgment, and defendant appeals.

The accident occurred a little after midnight of the 28th of February, 1873.

The only point in the case much pressed is, did the train stop at the station where the plaintiff designed to leave it? On this there is much testimony, which we have carefully examined and considered, and are of opinion it preponderates greatly in favor of the fact that the train did stop, and at the proper place, at Milton Station.

The proof is equally satisfactory that the plaintiff, doubtless apprehensive he would be carried past the station, jumped from the car while it was in rapid motion, and, in so doing, met with the accident of which he complains. We think the proof fully establishes the fact that plaintiff left the train under circumstances which would necessarily, or probably, render such an act perilous. This being so, he cannot recover damages for an injury thus brought upon himself, as the injury would be the result of his own want of ordinary care.

The rulings of this court in *Ill. Cent. R.R. Co. v. Able*, 59 Ill. 131, are entirely applicable to this case, as, in all its prominent features, there is great similarity.

It was there held, if a passenger, holding a ticket entitling him to alight at a particular station, is carried past such station, without his consent, and without being allowed a reasonable opportunity to leave the train, such passenger has an action against the corporation for whatever damages may have accrued to him by reason of non-delivery at the place for which he was ticketed; and, further, it was held, if such passenger voluntarily leaps from the train when in rapid motion, or leaves it under circumstances

which would necessarily, or probably, render such an act perilous, and receives bodily injury, he has no cause of action.

The testimony of the evidence and of two brakemen on the train, who were "wide awake" in the discharge of their duties, supplemented by that of A. H. Sutherland, a resident at the station, and of W. McNutt, a farmer residing near the station, is much more satisfactory, on the point of the stopping of the train at the station, than that of the plaintiff in the suit, slightly sustained, as it may have been, by Jacob B. Smith's testimony.

It is the doctrine of this court, as appellee's counsel urge, where there is a conflict of evidence, the decision of the jury will not be disturbed, especially in a case where the court can see from the whole record justice has been done. It may be said interference of this court will only be had to prevent a plain perversion of justice. *C. & A. R.R. Co. v. Shannon*, 43 Ill. 338. It is for that reason, and to promote that object, this court now interferes, being well satisfied the verdict is against the great preponderance of the evidence, and is a perversion of justice.

The judgment is reversed.

THE CHICAGO & NORTHWESTERN RAILWAY CO. V. COSS. (1)

Supreme Court, Illinois, September, 1874.

[Reported in 73 Ill. 394.]

ATTEMPTING TO CROSS OVER FREIGHT TRAIN TO REACH PASSENGER TRAIN IS NEGLIGENCE.—Where a person wishing to reach a passenger train attempts to cross over a freight train to which an engine is attached with steam up and liable to start at any moment, and without permission or notice to anyone in charge of the train, and while on the coupling of one of the cars, the freight train is suddenly started and he is thrown down and injured, he is guilty of negligence and cannot recover damages.

APPEAL from the Circuit Court of McHenry County.

Action by William Coss against the Chicago and Northwestern Railway Company. The facts appear in the opinion. The defendant was defaulted in the court below for want of a plea.

1. Cited in *C. & E. I. R. Co. v. Hines*, 132 Ill. 161, 169.

The jury assessed the plaintiff's damages at \$3,700. The plaintiff remitted \$1,500. The defendant, after the assessment of damages, moved in arrest of judgment, which was denied, and judgment rendered against the defendant for \$2,200, and the defendant appealed.

B. C. COOK, for appellant.

COON & CURTIS, for appellee.

Walker, J.—Appellant raises a number of questions on this record, amongst which is one that the court below erred in overruling a motion in arrest of judgment, and in support of that objection it is urged that the declaration fails to show any cause of action. It contains the averment that the company had a passenger depot at Crystal Lake, on its road, and that appellee went to the station for the purpose of taking passage on one of its trains to Cary station; that it was the duty of appellant to keep safe and convenient approaches, so that persons could go safely from the depot to the passenger cars, for the purpose of taking passage therein, but they, at the time the passenger train was about to start, knowingly, carelessly, willfully and negligently blocked up and stopped all of the public streets, approaches and grounds between the depot and passenger train, by running upon a track between them a long, large and heavy freight train of cars, which entirely closed, blocked up and stopped all public roads and approaches from the depot to the passenger train, when it was its duty to have kept such approaches open and free to persons going upon the passenger train; and it let the freight train so stand until almost the moment when the passenger train started; that it was impracticable and impossible for appellee to go from the depot to the passenger train without passing over, through or between the cars in the freight train; that in order that appellee might take passage on the cars, he, with due caution and circumspection, attempted to pass between the cars in the freight train, and to do so it was necessary for him to step upon the bumpers or couplings of the freight cars, and whilst on the same, appellant suddenly, carelessly and negligently, without any warning or notice, by ringing a bell, sounding a whistle, or otherwise, started up the train, and by a violent and sudden jerk caused appellee to lose his footing and to fall between the freight cars and the couplings or bumpers, and one of his feet was thereby

greatly injured, and he suffered great pain, was put to great expense, and lost many months' time, etc.

The default, even if it was regular, only amounted to a confession of the truth of the averments properly pleaded. It confessed no facts not averred, and whether this declaration contains averments sufficient to sustain the verdict, is the question we propose to consider.

Under the rule long since announced and adhered to by this court, a party receiving injury must show either that he is himself free from and the defendant is guilty of negligence, or if the plaintiff is guilty of negligence, that it is slight, and that of defendant is gross or wanton, or the injury willfully inflicted. These are the conditions upon which a party may recover in such a case. When tested by these rules, does this declaration show a right of recovery by appellee? That he, in attempting to cross between the cars of a freight train to which an engine with steam up was attached, and liable to start at any moment, and without permission, or notice to anyone in charge of the train or having authority over it, was, we think, manifestly negligence, and, divested of all verbiage, that is what is averred by this declaration. It was, no doubt, the duty of the company, in due time before the passenger train left, to clear the way, so that appellee and all other passengers could approach and enter it with safety. But a failure of the company to perform their duty did not license appellee to hazard his life to reach the train. Had the passenger train left before he could approach it safely, and thus have violated its implied agreement to carry him on that train, if he had procured a ticket for a passage thereon, he would have had his action against the road for all damages sustained by not carrying him on that train, but it conferred on him no right to imperil his life or limb.

In the case of *C. B. & Q. R.R. Co. v. Dewey*, 26 Ill. 255, it was said that the deceased knew that an engine was attached, with the steam up, liable to move at any moment; that it was in the night, when the engineer or conductor would not be likely to see or know of his effort to pass between the cars; that he gave no notice of his purpose to pass through, and the officers had a right to suppose a prudent or reasonable person would not attempt to pass at the time or under the circumstances, and the evidence

was that the bell was rung, and the usual notice thus given before the train was moved. On those facts the court held that deceased was guilty of negligence. It was also held, that it was negligence for the servants of the road to stop their freight train so as to prevent passengers from going from the depot to the passenger train; that having placed it there, it was their duty to have opened it, so as to afford a safe and easy passage to and from the passenger cars. In that case it was held, that negligence of deceased was not slight, as compared with that of the company, and recovery could not be had.

In a case like the present, whilst it is not necessary that a plaintiff should aver that he was free from all negligence or had observed due care, still, a declaration will be insufficient if it appear that he was guilty of negligence from the averments. In this case it does appear, from the declaration, that appellee was guilty of negligence, and from all the averments we are unable to say that his negligence was slight and that of appellant was gross, and, failing to so appear, the declaration was insufficient to sustain the judgment. Had it averred negligence of appellant and not shown negligence on his part, then the declaration would have been sufficient. The question of his negligence would then not arise until the trial, and then it would be compared with that of appellant, and if his should be found to be slight and that of appellant gross, he would be entitled to recover, otherwise he must fail.

The judgment must be reversed and the cause remanded, with leave to amend.

THE OHIO & MISSISSIPPI RAILWAY COMPANY v. STRATTON. (1)

Supreme Court, Illinois, June, 1875.

[Reported in 78 Ill. 88.]

**PASSENGER ALIGHTING FROM TRAIN BEFORE IT STOPPED
AT STATION CANNOT RECOVER FOR INJURIES.**—Where a
father and his son aged ten years were passengers in a railway train, and

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| 1. Cited in C. I. St. L. & C. R. | 2 Am. Neg. Cas. 517; C. & N. W. |
| Co. v. Dufrain, 36 Ill. App. 352, 2 | R'y Co. v. Scates, 90 Ill. 586, 2 Am. |
| Am. Neg. Cas. 514; L. N. A. & C | Neg. Cas. 623; Calumet Iron, etc. |
| , R'y Co. v. Johnson, 44 Ill. App. 56, | Co. v. Martin, 115 Ill. 358, 368. |

when the whistle sounded for their station, went out upon the platform, and as the train approached the station went down on the steps of the car, and being encumbered with baggage, as they stepped off the train, before it had stopped, the father was thrown on the platform and the son under the wheels of the train and received such injuries that he lost both legs, the railway company was not liable.

PASSENGER ALIGHTING FROM MOVING TRAIN MUST BEAR THE CONSEQUENCES.—A passenger has no right to attempt to get off a train when in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril and he must bear the consequences, however disastrous.

CARRIER NOT RESPONSIBLE FOR INJURY TO CHILD WHEN PARENT'S NEGLIGENCE WAS PROXIMATE CAUSE.—The negligence of a parent will not excuse a carrier from using all means in its power to prevent injury to a child, still the carrier will not be held responsible if the negligence of the father was the proximate cause of the injury.

APPEAL from the Circuit Court of Marion County.

Action by the appellee, against the appellant, to recover damages for personal injuries alleged to have been caused by negligence on the part of the defendant. The facts appear in the opinion. The jury returned a verdict for plaintiff for \$6,000, upon which the court rendered judgment, overruling a motion by the defendant for a new trial.

H. P. BUXTON, for appellant.

B. B. SMITH, and CREWS & HAYNES, for appellee.

Scott, Ch. J.—When plaintiff was injured, he was but ten years old. That was in 1863. He had just arrived from St. Louis. His father, in whose care he was while in the city, desired to leave for Salem by the evening express train on defendant's road. That train, it was known, did not usually stop at Salem, but on inquiry of the division superintendent, it was ascertained it would stop that night. Accordingly, he procured passage for himself and son. On their arrival at Salem, in attempting to leave the cars, plaintiff was in some way thrown or fell under the moving cars, and had both legs so badly crushed they had to be amputated. Soon after reaching his majority, plaintiff commenced this action to recover damages for the injuries sustained.

In the first count of the declaration, it is averred, as a ground of liability, that plaintiff being a passenger from East St. Louis to Salem, defendant did not at the latter station slacken the speed

of its train and stop a reasonable length of time to enable plaintiff to get off the cars without injury to his person; that defendant did not use due care in that regard, but, on arrival at Salem slackened the speed of the train, thereby inviting plaintiff to leave the cars, and that, with the consent and permission of defendant, plaintiff did alight from the cars, but, by means of the rapid rate at which the train was moving, he was thrown violently upon the platform, and thence underneath the moving cars; and in the second count it is averred defendant did not at Salem stop its train a reasonable length of time to allow plaintiff to leave it with safety, but negligently and carelessly suddenly started the train in motion, whereby plaintiff was violently thrown underneath the moving cars, and was injured.

It is not claimed any recovery can be had on the first count. The proof shows, and it is not now disputed, the train was stopped a reasonable time to permit all persons to get off with entire safety. A number of passengers, among them women and children, did get off at that station, ample opportunity being allowed for that purpose. There can be no pretense that that branch of the case has been sustained by any testimony offered. The contest is as to the cause of action attempted to be set up in the second count, viz.: whether defendant, although it may have stopped its train, suddenly started it up again with such violence while plaintiff was in the act of getting off as to throw him upon the platform, and from thence under the cars.

The jury found the issues for plaintiff, and the principal question is, whether the verdict can be maintained on the testimony.

It will not be necessary to remark on all the instructions given on behalf of plaintiff, further than to say many of them are faulty in the statements of legal principles applicable to the case. The case is by far too serious in its character and too sad in its consequences to be decided on any mere technical objections to instructions. We prefer to place our decision on the merits of the case alone. The injury plaintiff has sustained is irreparable, and, if a recovery can be had at all, the present judgment ought to be affirmed. No measure of damages can make full reparation. These considerations have induced a most careful and painstaking investigation of the case in all its phases. We have

examined the record with that degree of care the importance of the case demands, and, however much we may be touched by the inexpressibly sad misfortune of plaintiff, we have been unable to discover, even under the most favorable view of the evidence, any tenable ground upon which to place an affirmance of the judgment in his favor.

Plaintiff was too young to exercise any great degree of care for his personal safety. He was largely controlled in his actions by his father, in whose care he had been traveling. The arrangement for leaving St. Louis on the evening express train, that did not usually stop at Salem, was made by his father. Plaintiff had nothing to do with the selection of the train he was to go on. An accommodation was to leave on the same evening, but at a later hour, which it was known would stop at all the stations, for the convenience of passengers, but his father chose for them the express train, and plaintiff had no choice in the matter.

Conceding it to be a correct principle, the negligence of the parent or other guardian having in charge a child of tender years would not excuse the carrier from using all the means in its power to prevent the injury, still, if the negligence of the former was the proximate cause of injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier upon no just principle can be held responsible. It is not the negligence of defendant, but of the party having the control of the child, and if any liability attaches to either party, it must be to the latter. Nevertheless, it is the duty of defendant to make it appear it was by no omission of duty on its part the accident occurred, and that the timely discharge of all duties imposed by law, and the provident care for the safety of passengers, would not have averted the danger. This brings us to consider whether defendant in the case at bar has been guilty of any negligence that tended to produce the injury to plaintiff, even under the strictest rule of liability the law imposes.

There is but little conflict in the evidence as to the principal facts—not more than often occurs in the accounts given by different persons of any casualty witnessed by them. Both parties agree plaintiff's father was assured by Mr. Hinckly, the division superintendent, the express train would stop at Salem that night, and that this assurance was given before he engaged passage for

himself and son. At Odin, a number of passengers were taken on for Salem, under a like assurance from the superintendent the train would stop at that station. This latter fact must have been known to plaintiff's father, as the superintendent was in the same coach with him, and it seems hardly possible he did not hear the inquiries on that subject. It was about dark, or perhaps a little after, when the train reached Salem. As the train was being checked up, passengers for that station began to prepare to leave the cars, when Hinckly, in a voice loud enough to be heard, and was heard by many, said to them, "Don't get off till the cars stop!" Plaintiff and his father both deny they heard this announcement.

In his testimony, plaintiff's father gives this account of the accident that befell his son: When the whistle sounded for Salem station, he and his son went out upon the platform of the car. As the train approached the station, they went down on the steps of the car, to be ready to step off as soon as the train should stop. Plaintiff was on the lower step, and witness on the one next above, holding plaintiff by the hand. Both of them carried some luggage. Witness remembers saying to his son, not to get off until the train stopped. When the car came to the platform of the station, plaintiff was about to leave the car, and the witness adds, as to the cause of the accident, the train seemed to stop just as his son stepped off, and then suddenly started forward again, by a violent movement, which threw him upon the platform, and his son under the wheels of the cars. Substantially the same account of the immediate cause of the accident is given by plaintiff. No doubt they believed, and do yet believe, the train had come to a halt when plaintiff stepped from the cars, but in this they must have misjudged, being misled, in all probability, by the darkness of the hour. The violence of the accident corroborates this theory of the case. Witness says he was thrown a complete somersault upon the platform of the station at the same time his son was thrown under the wheels of the cars. This result could not have been produced unless the train had been in rapid motion. Manifestly, they were mistaken as to its speed, or else they would never have taken the fatal step. Other passengers who got off at that station all unite in saying the train was stopped in the usual way, and they noticed no unusual motion. No one of all the witnesses

sworn, except plaintiff and his father, observed the fact testified to by them, that the train was first stopped and then suddenly started with great violence. The witness Andrews says that he and his mother, then 58 years old, were standing up in the car, waiting for the train to stop, but experienced no sudden jerk or shock. A woman, with an infant in her arms, was also standing up in the car, but observed no unusual or violent motion. All other passengers for Salem got off, when the train stopped, without difficulty, plenty of time being given for that purpose. No reason is shown, in all this evidence, why plaintiff and his father could not have done the same thing, had they observed due care for their personal safety.

By their voluntary choice they selected a most dangerous place on the steps of the car while the train was yet in motion. Both were encumbered with baggage, which would effectually prevent them from holding onto anything to secure their safety. The position occupied was dangerous, and was taken without due care. Whether the accident was produced by any sudden, violent movement of the cars, caused by putting on or letting off brakes in the ordinary management of the train, or whether they were induced to step off, under the belief the train had come to a halt, when it had not, it must be attributed to their own omission to observe the usual precautions, rather than to any negligence on the part of defendant. It may have been the impression of plaintiff's father the train would stop at that station but a short time, and that it would be necessary to get off very quick. But this belief, however induced, could not justify him in exposing himself and son to such great hazards. He had been assured by officers in charge of the train it would stop to let off passengers, and he ought to have relied on that assurance. Had he remained in his seat he could have heard the announcement, which was distinctly heard by others: "Don't get off till the cars stop!" which would have put him on his guard.

Defendant had undertaken to stop its train at Salem to let passengers get off, and any violation of that agreement would have subjected it to damages. A passenger has no right to attempt to get off a train when in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company it is at his peril, and he must bear the consequences,

however disastrous. Ill. Cent. R.R. Co. *v.* Slatton, 54 Ill. 133; Chic. & Alton R.R. Co. *v.* Randolph, 53 Ill. 510.

The verdict, in our opinion, is against both the law and the evidence, and the judgment must be reversed.

THE ILLINOIS CENTRAL RAILROAD COMPANY V. GREEN. (1)

Supreme Court, Illinois, September, 1875.

[Reported in 81 Ill. 19.]

CONTRIBUTORY NEGLIGENCE IN GETTING OFF TRAIN AT DANGEROUS PLACE.—Where a passenger, in the night, while asleep, is carried beyond his station, and the train stops upon an open bridge to take water, and he gets up, and upon encouragement of other passengers, but not encouraged by anyone connected with the company, steps off the car and the train gives a jerk which causes him to fall through the bridge and he is injured, he is guilty of contributory negligence and cannot recover damages, and the railroad company is not negligent in not notifying him not to get off.

APPEAL from the Circuit Court of Cook County. The facts are stated in the opinion.

JNO. N. JEWETT and CHAS. T. ADAMS, for appellant.

BONNEY, FAY & GRIGGS, for appellee.

Sheldon, J.—This was an action on the case, for personal injury to appellee whilst a passenger on the cars of appellant.

The appellee took the cars of appellant at Odin, in this State, going south, at about nine o'clock in the evening of May 25, 1870. He was going to a place about seven miles east of Mt. Vernon, and took a ticket to Ashley, which is some five miles north of Little Muddy Bridge. The accident occurred in getting off the train at this bridge. There was no station there, but there was a water tank, and it was a regular stopping place for supplying water to the engines, and for no other purpose.

Appellee's account of the affair is substantially as follows: That the conductor on the train took his ticket between Odin and Centralia; that he objected to the conductor taking his ticket, because appellee was a stranger on the road, and wanted to know

1. Cited in Ill. Cent. R. Co. *v.* Lutz, 84 Ill. 598, 2 Am. Neg. Cas. 613.

when he arrived at Ashley ; that the conductor said to him, "give yourself no uneasiness, we always see that our passengers are put off at their regular stations ;" that they stopped at Centralia, and remained there awhile ; that Centralia is fourteen miles from Ashley ; that he went to sleep, and remained so until he heard the locomotive whistle and the station called out of Irvington, which was seven and one-half miles from Ashley ; that it was four miles from Irvington to Richview ; that Irvington and Richview were the only stations between Centralia and Ashley ; that after leaving Irvington he went to sleep again ; that he heard the whistle, and no station announced, and then when the cars traveled along again he supposed they were going down grade, which he took to be a grade from Ashley to Richview, and he began to think he was reaching his station, and he inquired if they were coming to Ashley, and the response was by passengers on the cars, that they had passed Ashley and were coming to the next station ; that when the cars became about still he stood up at his seat and looked back and asked the passengers if they saw anything of the conductor on the car, and they remarked they did not ; that he felt that he had been neglected, and went to the door and finding it unlocked, turned around and said, "Gentlemen, this is right, I suppose," and being answered in the affirmative, he then opened the door and went out on the platform ; a light was shining on the platform, but there was no brakeman there ; that he put out his foot to reach the platform, if he could, and there being no platform as he expected, it gave him a jerk and pulled both feet off the car, and left him hanging by one hand ; his weight pulled him loose, and he fell and received the injury ; that it was between 10 and 11 o'clock at night when he arrived at Little Muddy Bridge, and was quite dark. In falling, appellee did not strike anything till he struck the ground under the bridge, a distance of some thirty feet. He said he knew he was not at Ashley before he went out of the car.

There was further testimony that the train, at the time, between Odin and Centralia, was under the charge of conductor Gilman. Gilman testified that he could not remember having any conversation with any passenger on that train, and says, if a passenger got on at Odin with a ticket for Ashley, he would punch the ticket and hand it back. The train, at Centralia, was handed

over by Gilman to conductor Morgan, who says that the train consisted of a sleeping coach, a ladies' car, a gentlemen's car, a second-class and baggage car combined, and an express car. On leaving Centralia, he says, he went through the train and took up all tickets to local points, as far south as DuQuoin. The train was large, and stopped at all regular stations. The stations were called. That is the brakeman's business, although he did it also. That night, one brakeman was stationed between the sleeping coach and ladies' car. He would call the stations on both of these cars. The other brakeman was between the baggage car and the next car to it—the gentlemen's car. Thus located, all the brakes of the four cars were under the control of the two brakemen. The train stopped at Little Muddy Creek that night to take water. The bridge is for trains to pass on. The train stands partly on the bridge while they take water. No station there, and no platform. Bridge never used except for cars. No light there that night when the train stopped. Several passengers got off at Ashley that night, among them women and children, and were attended to by the conductor. That the general custom of railroads is, to notify passengers of the stations by calling out the names of the stations as they are reached.

Thos. Winters was the brakeman stationed that night between the baggage car and the gentlemen's car. He testifies that he called the station as the train arrived at Ashley, on the night of the accident. He remembers it from the fact that Morgan, the conductor, the next day asked him if he had called that station, and he then remembered that he had.

A Mr. Turlay, of Centralia, who was on the train, states that he saw a passenger get up and walk out of the rear door of the car at Little Muddy Bridge, and he supposed that he was going into the ladies' car on account of the annoyance occasioned to him by the conversation of a party of four persons who were sitting opposite to him, Mr. Turlay being one of the number; that the man never asked any question of anyone, so far as he heard.

We are of opinion the evidence in this case discloses no cause of action.

It is said there was negligence in carrying the appellee past his station.

Conceding all that is claimed in that respect, appellee would not, for such cause, be justified in jumping off the train, or otherwise needlessly exposing himself to injury, and then claim liability of appellant for the injury he might receive in consequence. The injury here received had no proper connection with being carried past a destined station; and for such act, appellant cannot be held responsible for any such remote and unnatural consequence thereof as the injury here sued for.

It is then insisted that the stoppage of a passenger car at such a place as the one in question, without some precaution to notify passengers of danger, was an act of gross negligence.

But why notify passengers of danger? It was a stopping place for getting water, not for passengers. The bridge was intended solely for the passage of cars, not for the alighting of passengers upon it. The place for the passenger, here, was inside, not outside of the car. The train, and the appellee in his proper place inside the car, were as safe upon the bridge as they would have been anywhere away from it. The fact that the cars were upon the bridge involved no danger or risk to the passenger, so long as he remained in his right place, within the car.

There was a right to presume that the passenger would keep in his place inside the car. It was not to be anticipated that he would be getting off the car where he had no business to do so, and that there was any necessity for providing against it.

It cannot be said that there was any invitation to appellee to alight where he did. The mere stopping of the train is not to be so regarded.

It may be inferred from appellee's testimony that he heard the whistle at the bridge. If so, it was not a signal of approach to a station. The testimony of the conductor on that head was: "They (brakemen) know where the tank is, and the engineer does not whistle in coming to it, with the exception that once in a while, when the engineer sees the train is going by the tank, he will then give a little toot—whistle down brakes; don't know whether he whistled that night or not. There is a fixed whistle for down brakes, one short whistle, and is used on all portions of the line. They use the same whistle when they want to stop, except at regular stations they whistle a long whistle, and don't whistle any stop whistle at all. This short toot is used to apply

the brakes between stations where there is danger, when you want the train to stop at an irregular place where there is danger or anything on the track, but in stopping regularly we don't use that at all."

Appellee testified that he was accustomed to travel on railways. He was not justified in taking the whistle as notice of approaching a station. Any encouragement to get off, which, according to his testimony, he might have received from any passenger, of course, is not to be imputed to the company as in any way its act. Appellee getting off the car where he did was an entirely uncalled for and voluntary act of his own, uninvited and unencouraged by anyone in the management of the train, and he took the risk of the consequences. The act of thus getting off in the darkness of night at an unknown and dangerous place was one of gross carelessness, whereby appellee exposed himself to the injury which he received. The harm which one brings upon himself he is to be considered as not having received. So far as his relations to others are concerned, such harm is uncaused. *Chic. & Alton R.R. Co. v. Becker*, 76 Ill. 31.

Had appellee used ordinary prudence the casualty would not have happened. Having failed in this, the company ought not to be liable. *Chic. & N. W. R.R. Co. v. Sweeney*, 52 Ill. 331; and see *Chic. & Alton R.R. Co. v. Gretzner*, 46 Id. 75; *C. B. & Q. R.R. Co. v. Van Patten*, 64 Id. 511; *Chicago, R. I. & P. R.R. Co. v. Bell*, 70 Id. 103; *Todd v. Old Colony, etc. R.R. Co.*, 3 Allen, 18; *Louisville & N. R.R. Co. v. Sickings*, 5 Bush, 1; *Pitts. & C. R.R. Co. v. Andrews*, 39 Md. 329; 2 Redf. Am. R'y Cas. 552, in note to *McClurg's case*; *Ind. etc. R.R. Co. v. Rutherford*, 29 Ind. 82.

It is a requisite to the liability of a railway company, as a passenger carrier, that the passenger should not have been guilty of any want of ordinary care and prudence which directly contributed to the injury. 2 Redf. R'y Cas. 224, 236.

The judgment must be reversed, there being no cause of action under the evidence.

ILLINOIS CENTRAL RAILROAD CO. v. LUTZ. (1)

Supreme Court, Illinois, January, 1877.

[Reported in 84 Ill. 598.]

PASSENGER GOING ON STEPS OF MOVING TRAIN AND INJURED CANNOT RECOVER DAMAGES.—Where it appeared that on a dark and rainy night, when his station was announced, a passenger went out on the platform of the car, and seeing that the train was going by the station, he stepped down on the steps, and just then the conductor said "Don't jump" and reached for the bell-rope, and the passenger either slipped and fell off in attempting to return, or attempted to jump off and was injured, in either case he could not recover damages.

APPEAL from the Circuit Court of Cumberland County. The facts appear in the opinion.

GEORGE W. WALL, for appellant.

Sheldon, Ch. J—The appellant asks that the judgment be reversed because there is no evidence to sustain it.

The accident in question occurred on the night of the 31st of July, 1875. The night was dark and rainy, and the rails of the road slippery. The destined station of the plaintiff was Neoga. His own account of the affair is, that when the station was announced, he started out on the platform and saw that the train was passing the station house without stopping; that he stepped down on the steps; could not say which step he was on; had hold of the railing; that the conductor came out just then and said, "Don't jump;" that he replied he would not, and was just then in the act of turning to go back; that the conductor reached up at the bell-cord to stop the train, as he supposed, and then something struck plaintiff and knocked him off; that he did not know what it was that hit him; that nobody touched him, nor did he see anything that did; when he came to, he found himself in the act of getting up from the ground, and just about then the conductor came to him and helped him up; that he stepped forward, and the conductor said, "Look out, you will step in the cattle guard," and then he noticed that he was just south of the cattle guard—the first cattle guard south of Neoga station; the train backed up over the cattle guard, and stopped not far from the switch.

1. Cited in *Calumet Iron, etc. Co. v. Martin*, 115 Ill. 358, 368.

The physician who examined plaintiff carefully the day after he was hurt, testifies that he could not find any abrasion or discoloration upon his person. It is quite apparent that he could not have been struck by any portion of the fence of the cattle guard. Actual measurement shows it to have been impossible unless his person was projecting beyond the cars. The train backed over the cattle guard—no obstruction was noticed by the conductor or the brakeman, nor was anything seen by them, as well as by the plaintiff, which could have struck him while he was on the cars. Any stationary object near the track that could have touched him would have necessarily touched the cars, but there was no sign of any such thing.

The probability is, that in turning about to come back into the car he slipped and fell off, or, if not, he must have attempted to jump off, and in doing so received the injury. In either case, he could not recover damages for the injury, because it would have been the result of his own want of ordinary care. If he was in danger of being carried past his station, he would not have been justified in getting off while the train was in motion, or in imprudently exposing himself to danger. Ill. Cent. R.R. Co. *v.* Able, 59 Ill. 131; Ill. Cent. R.R. Co. *v.* Green, 81 Ill. 19.

Regarding the verdict as entirely unsupported by the evidence, the judgment is reversed.

DOUGHERTY *v.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY. (1)

Supreme Court, Illinois, September, 1877.

[Reported in 86 Ill. 467.]

PASSENGER JUMPING FROM TRAIN THAT FAILED TO STOP AT STATION.—If a passenger is carried past his station, the train failing to stop there, and he jumps from the train some three miles beyond while it is running at the rate of fifteen miles an hour and is injured, he cannot recover from the company.

APPEAL from the Circuit Court of Warren County. The facts are stated in the opinion.

1. Cited in C. I. St. L. & C. R. *v.* Arnol, 144 Ill. 261, 2 Am. Neg. Co. *v.* Dufrein, 36 Ill. App. 352, 2 Cas. 694.
Am. Neg. Cas. 514; C. & A. R. Co.

STEWART & PHELPS, for appellant.

J. M. WALKER, for appellee.

Craig, J.—This action was instituted to recover damages for personal injuries.

Appellant, on July 3, 1874, at Mt. Pleasant, Iowa, procured a ticket for Cameron, Illinois, and took passage on a regular passenger train for that place. At Burlington he left the passenger train, and for some reason took a freight train which had a caboose car attached. Appellant, as appears, desired to go to the house of a friend who resided about three miles east of Cameron, near the track of the railroad. Between Kirkwood and Monmouth he attempted to make an arrangement with the conductor to have the train stop on a curve in the road near the house of his friend, three miles east of Cameron, but was informed by the conductor it was against the rules of the company. After some conversation on the subject, the conductor told appellant to give the brakeman a quarter of a dollar and he would have the engineer stop. Appellant informed the brakeman what the conductor had said, and gave him the money, who said he "would see about it." Before reaching Cameron, however, appellant was notified, both by the conductor and brakeman, that the train would not stop at the curve, and the money was tendered back to him. There is a conflict in the evidence in regard to whether the train actually stopped at Cameron. Some of the witnesses say it did, while others testify the other way. But be that as it may, it is clear the train either stopped or ran so slow that passengers could get off or on the train, and one passenger left the train at this station. We do not, however, regard this disputed question of fact as material, as appellant did not desire to get off the train at Cameron, and made no attempt to do so. The whole evidence points to the conclusion that he expected to leave the train at the curve. When the train reached the curve it was running at the rate of from fifteen to eighteen miles an hour. Those in charge of the train did neither stop nor slacken its speed. Appellant testified the conductor told him he had better get off, but this is denied by the conductor; and upon this point there is a direct and positive conflict in the evidence, and the verdict of the jury against appellant must be held conclusive. He did, however, jump from the train, and was injured.

It is first contended by appellant that it was gross negligence on the part of the company to fail to stop the train a sufficient time to allow him to get off at Cameron. Suppose that be true, such fact afforded no excuse for the appellant to leap from the train three miles from the station when it was running at the rate of fifteen miles an hour. If he was carried beyond Cameron for the reason the train did not stop, it was his plain duty to remain on the train until such time as he could leave with safety, and then bring an action against the company for such damages as he sustained on account of the failure of the railroad company to stop its train at the station where it had contracted to leave him. The fact that the company failed to stop at Cameron, if it be a fact, is no excuse for the conduct of appellant in leaping from the train. And where an injury has been received by the reckless act of a passenger in an attempt to leave the train when in motion, no recovery can be had, although the company may have disregarded a duty imposed by law in failing to stop at the station. *Shear. & Redf. on Neg.* 341; *Jeffersonville R.R. Co. v. Swift*, 22 Ind. 450; *Penn. R.R. Co. v. Chappel*, 23 Pa. St. 147.

If we are correct in this view of the question, it follows appellant cannot complain of the modification of his first instruction, as it was more favorable to him than the law would justify, even after the court's modification.

It is also contended the court erred in giving appellee's twelfth instruction, as follows :

"The jury are instructed that if they believe, from the evidence in this case, that the proximate or immediate cause of the injuries that it appears, from the evidence in this case, the plaintiff sustained on the 3d of July, 1874, was his jumping from the defendant's train while it was in motion, then the jury are instructed that he cannot recover in this case, if they believe, from the evidence, that he, by the exercise of ordinary care and prudence, could have avoided alighting from the train and receiving the injuries complained of."

The object of the instruction doubtless was to meet the position of appellant, assumed before the jury, that the failure of the company to stop the train at Cameron was gross negligence, and the cause which led to the injury sustained. For this purpose the instruction may have been proper. It could not, in any

event, mislead the jury. Had this been an action to recover damages because the company had carried a passenger beyond the station where he had paid the company to carry him, then the fact of the company's failure to stop at the station might be regarded an important element in the case; but in this case we do not regard it of controlling importance. Under the evidence, as given to the jury, we perceive no ground upon which appellant could recover. The judgment of the circuit court will, therefore, be affirmed.

Judgment affirmed.

THE KEOKUK NORTHERN LINE PACKET COMPANY v. TRUE. (1)

Supreme Court, Illinois, January, 1878.

[Reported in 88 Ill. 608.]

LIABILITY OF STEAMBOAT COMPANY FOR INJURIES TO PASSENGER GOING OFF BOAT.—Where it appeared that a steamboat arrived at one of its stopping places and was to remain two hours, and two stagings were put out side by side, on one of which employees of the boat carried coal in boxes on board of the boat and returned to the shore on the other staging with empty boxes, and a passenger, after watching the procedure, attempted to follow two employees who were going ashore with empty boxes on the staging so used, and was struck by a loaded box of coal in the hands of two other employees, who, instead of using the staging previously used, crossed to the staging upon which the passenger was, and the passenger was injured, the company is liable.

PASSENGER ON STEAMBOAT NOT NEGLIGENT IN GOING ASHORE AT A LANDING NOT HIS DESTINATION.—A passenger on a steamboat that is to remain at one of its landings for two hours, is not compelled to remain on board until his destination is reached, but may go ashore, and if while attempting to do so he is injured through the carelessness of employees of the steamboat he may recover damages from the steamboat company.

APPEAL from the Circuit Court of Adams County.

Action brought by Abner True against the Keokuk Northern Line Packet Company. Instructions numbered 4 and 4½, given for the plaintiff, are as follows:

"4. If the jury believe, from the evidence, that the plaintiff was

1. Cited in *C & A. R. Co. v. Byrum*, 153 Ill. 131, 2 Am. Neg. Cas. 719.

a passenger on the defendant's boat at the time of the alleged injury, then it was the duty of the defendant, by its officers and employees, to use the utmost practicable care and diligence to carry the plaintiff safely and securely to his destination, and said company was also bound to use all reasonably practicable care and diligence to maintain among the crew of said boat, including the deck hands and roustabouts, such a degree of order and discipline as might be requisite for the personal safety and security of the plaintiff and other passengers who might be traveling on said boat; and said company was also bound to have due supervision and control over the crew of said boat by its proper officers."

"4½. If the jury believe, from the evidence, that the defendant was guilty of negligence as charged in the declaration, then it makes no difference, as to the responsibility of the defendant, whether such negligence appears and is proved by the testimony on the part of the plaintiff, or by the testimony of the defendant's own witnesses."

WILLIAM W. BERRY and JAMES H. DAVIDSON, for appellant.

WHEAT & MARCY, for appellee.

Craig, J.—This was an action brought by Abner True, in the Circuit Court of Adams County, against The Keokuk Northern Line Packet Company, to recover damages for a personal injury, a fracture of the neck of the left femur, caused, as claimed by the plaintiff, from the carelessness of the servants and employees of the company. A trial of the cause before a jury resulted in a verdict in favor of the plaintiff for \$3,600. The court overruled a motion for a new trial and rendered judgment upon the verdict. The defendant appealed, and in the argument a reversal of the judgment is claimed, on the ground that the evidence does not sustain the verdict, and the court erred in giving certain instructions for the plaintiff and refusing others asked by the defendant. Other questions have been argued, but these are mainly relied upon.

It appears from the evidence that on the 25th day of November, 1875, appellee took passage at Canton, a town on the Mississippi River, above Quincy, for Falmouth, a town on the river below, on the steamboat Alex. Mitchell, a regular packet, belonging to and run by appellant on the river between St. Louis and Keokuk. He paid his fare and secured a ticket as a passenger

on the boat. The boat arrived at Quincy between 10 and 11 o'clock in the forenoon of the next day, and was landed above the wharf boat, and near the coal yard; both stagings of the boat were put out side by side and close to each other, one end resting on the shore and the other over the bow of the boat. Appellee having been informed by the captain of the boat that the boat would not leave for two hours, and having some business in the city of Quincy, he undertook to leave the boat and go ashore, and while in the act of passing over the staging leading to the shore, he was struck by a coal box, in the hands of two of the employees of the boat, in which they were carrying coal from the shore upon the boat, and injured.

Thus far there seems to be no material conflict in the evidence, but in regard to the details of the accident, and in reference to who was in fault, there is a clear and decided conflict in the testimony. At the time the accident occurred there were no passengers on the boat but appellee, and he was the only witness in his own behalf in regard to the circumstances and manner in which he received the injury. The substance of his evidence was that at about 11 o'clock the captain of the boat informed him the boat would not leave until 1 o'clock, and as he desired to go into the city to buy a carriage, he left the cabin of the boat and went down the steps to the lower deck, and there stopped and looked to see how the men carrying coal were going on and off the boat. He saw two men coming on the boat with a loaded box of coal on the "forward staging," and two going off the boat with an empty box on the "after staging." The stages were side by side, and he started to follow the two men with the empty box, who were passing from the boat on the "after staging." He had only gone a few feet when the men with the loaded box, crossing over from the "forward staging" to the "after staging," ran against him, the handle of the loaded coal box striking his hip, knocking him down.

If the account given by appellee of the transaction be the correct one, the judgment may be sustained. Appellee did not recklessly rush into danger. Before attempting to leave the boat he stopped and looked, and saw, from the manner in which the employees were coming upon and going from the boat, that he would meet no obstruction in passing along the "after staging."

He had no reason to believe that the men with the loaded box would cross over from the forward staging to the after staging. No necessity existed for such conduct on their part, nor has any reason been shown why they did so. The passageway for appellee to leave the boat, so far as could be seen or anticipated, was clear, and from the manner in which appellee saw the men carrying coal on the boat, and from the manner they were leaving the boat after the coal was unloaded, he had the right to suppose it was safe to leave the boat over the "after staging." But, it is insisted, it was the duty of appellee to remain in the cabin, and he had no right to leave the cabin of the boat until he reached his place of destination. We do not regard this position as tenable; the boat was not expected to leave the landing for two hours, and it would be unreasonable to hold that a passenger was compelled during all that time to remain in the cabin. Upon the landing of a boat, one object of putting out the staging is to afford persons interested an opportunity to pass to and from the boat, and we are not aware that appellant had any rule or regulation requiring passengers to remain in the cabin under the penalty of being run over by a "roustabout," and if they had, we are not prepared to hold that such a rule or regulation would be reasonable or obligatory upon a passenger.

The appellant, however, claims that the testimony of appellee is overcome by that introduced by it, and hence the testimony preponderates against the verdict. Five witnesses were introduced by appellant, in relation to the accident—Wright, Bingham, Banks, West and Stewart—most of whom claimed to know the facts in regard to the accident, and in the main they agree in saying that the men with the loaded box did not cross over from the forward to the "after staging," but they were carrying in the coal on the "aft staging," and going off with empty boxes on the forward staging; that the men came in on a fast walk or trot, and when appellee was met on the staging they could not stop.

If the testimony of these witnesses be true, we do not think the appellee ought to recover, but it is apparent the jury did not regard their evidence as being entitled to a high degree of credit. Of these witnesses it appears that four of them, Wright, Bingham, Banks and West, were colored men. Wright and Bingham were "roustabouts," who were carrying the coal box when

appellee was struck. Banks was not in the employ of appellant at that time, but his only business was to run on a boat, sometimes as a fireman and at other times as a "roustabout." West was one of the porters on the boat, and Stewart kept a boat-store and furnished groceries and provisions for the boat. They all resided in Quincy except West, who resided in St. Louis.

It is true that no evidence was introduced to impeach the reputation of these witnesses for truth and veracity, yet, with the exception of Mr. Stewart, from their own statements it is apparent they were not such witnesses as would carry conviction to the jury of the truth of their statements. The jury were the judges of the credibility of witnesses, and where there was as clear a conflict in the evidence as here, it was for them to determine who told the truth. This they have done, and we are not prepared to say they misjudged the relative weight to be given the evidence of the witnesses.

Appellee's instructions one, two and three announce the familiar doctrine, that if the plaintiff, when injured, was in the exercise of ordinary care, and the defendant's servants failed to use ordinary care, in consequence of which the plaintiff was injured, then he might recover.

It is contended that, under the facts of this case, the instructions should have been so modified as to require of the plaintiff the exercise of extraordinary care. It will be observed that the boat had landed; staging was put out so that persons could pass to and from the boat; the boat was to remain several hours. So far as a prudent man could discover, it was neither dangerous nor perilous to attempt to leave the boat, providing the boat hands should exercise ordinary care and prudence. Under such circumstances we do not regard the position of appellee, when he received the injury, so dangerous as to require of him the exercise of extraordinary care. There is no similarity between this case and a case where a passenger attempts to leave a train of cars in motion before the platform is reached.

Appellee's fourth instruction announces the principle that the defendant, as a common carrier of passengers, was required to use the "utmost practicable care" for the safety of its passengers. This, it is said, requires a higher degree of care than the law imposes. We do not, however take that view of the instruction.

In *C. B. & Q. R.R. Co. v. George*, 19 Ill. 510, it was held that carriers of passengers for hire are bound to the utmost care and diligence in providing for their safety by the use of sufficient and suitable modes of conveyance and in managing, directing, and using these means thus provided. In *Galena & Chicago Union R.R. Co. v. Fay*, 16 Ill. 558, it was held, the degrees of care, vigilance and skill are the highest, and the responsibility is for the least neglect known to the law, short of insurance; and these in their application have respect to the particular mode of travel or transportation offered. See also, *Galena & Chicago Union R.R. Co. v. Yarwood*, 15 Ill. 469, and *Frink v. Potter*, 17 Ill. 410, where the same rule is announced. Under these authorities and subsequent cases, the principle announced in the instruction was correct.

Objection is made to appellee's instruction four and one-half, that it in substance directs the jury, if the defendant was negligent, it was guilty, regardless of any other consideration. We do not, however, so understand the meaning of the instruction. Upon an inspection of the language used, no logical inference can be drawn from it except this, that the negligence of the defendant may be proven as well by the witnesses of the defendant as of the plaintiff.

The refusal of the court to give defendant's instructions two and five is also relied upon as error. The second instruction is liable to at least one serious objection. It announces the proposition that the defendant was not liable for an injury plaintiff might receive in attempting to go on shore at an intermediate landing between Canton and Falmouth. No regulation of the defendant, no usage or law that we are aware of, required plaintiff to remain on the boat from the time he took passage until he reached his destination. On the other hand, we perceive no reason why a passenger may not, upon the landing of a boat, go upon shore if his business requires it, and, at the same time, hold the boat liable for an injury received through the negligence of the employees of the boat, providing the passenger was in the exercise of ordinary care.

As to the other instruction, its substance was contained in instruction number one, which was given, and even if it was free from objection, which we do not concede, the court was under no

obligation to give it, as we have often held it not to be error to refuse duplicate instructions.

As we perceive no substantial error, the judgment will be affirmed.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY v. SCATES. (1)

Supreme Court, Illinois, September, 1878.

[Reported in 90 Ill. 586.]

RAILWAY COMPANY NOT LIABLE FOR INJURY TO PASSENGER ATTEMPTING TO BOARD A MOVING TRAIN.—Where it appeared that a passenger, having plenty of time to get on a train while it was standing, waited until it began to move, and in attempting to get on board, held on to the railing of the car and followed the moving train until he came against a post which stood near the track on the station platform and was injured between the post and the moving car, he was guilty of such negligence as would preclude a recovery.

A REFUSAL TO INSTRUCT THAT PLAINTIFF COULD NOT RECOVER IF THE INJURY WAS CAUSED BY REASON OF HIS ATTEMPT TO BOARD MOVING TRAIN ERROR.—An instruction that if a sufficient time was allowed passengers to get on the train, and if plaintiff, after the cars were in motion, attempted to get on board and was injured *by reason* of the car being in motion, he could not recover, was proper and should have been given when requested.

PERSON HAS NO RIGHT TO BOARD A MOVING TRAIN.—A person has no right to get on a moving train, and a railroad company is not bound to furnish platforms for those who attempt to do so.

RAILROAD NOT LIABLE.—A railroad company is not liable for an injury caused by the negligence of a third party unless they act in concert.

APPEAL from the Superior Court of Cook County. The facts appear in the opinion.

B. C. COOK, for appellant, cited: *Quincy Coal Co. v. Hood*, 77 Ill. 68; *Gridley v. Bloomington*, 68 Id. 47; *C. B. & Q. R.R. Co. v. Lee*, Ib. 576; *Guest v. Reynolds*, Ib. 478; *Knight v. Ponch*.

1. Cited in *L. N. A. & C. R'y Co. v. Neg. Cas.* 684; *I. C. R. Co. v. Larson*, 44 Ill. App. 56, 2 Am. Neg. son, 152 Ill. 326, 329. Cas. 517; *C. R. I. etc. R. Co. v. Distinguished as to sufficiency of Eininger*, 114 Ill. 85; *N. C. St. R'y evidence in I. C. R.R. Co. v. Larson*, Co. v. Williams, 140 Ill. 282, 2 Am. 152 Ill. 326.

R.R. Co., 23 La. Ann. 462; Phillips *v.* R. & S. R.R. Co., 49 N. Y. 177; Harpers *v.* Erie R.R. Co., 32 N. J. L. 90; C. R. I. & P. R.R. Co. *v.* Bell, 70 Ill. 102; Ill. Cent. R.R. Co. *v.* Hill, 72 Id. 222; Lovenguth *v.* Bloomington, 71 Id. 240; Correll *v.* B. C. R. and M. R.R. Co., 38 Ia. 121; Liddy *v.* St. Louis Mo. Co., 40 Mo. 506; Jetter *v.* N. Y. & H. Co., 2 Keyes, 154; O. & M. R.R. Co. *v.* Stratton, 78 Ill. 92; Harris *v.* Hatfield, 71 Ill. 310; Worcester *v.* Bridge Co., 7 Gray, 459; Bosworth *v.* Swansen, 10 Met. 363; Heland *v.* Lowell, 3 Allen, 408; Stanton *v.* R.R. Co., 14 Id. 486; Sutton *v.* Wauwatosa, 29 Wis. 23; Ill. Cent. R.R. Co. *v.* Hetherington, 83 Ill. 510; C. & R. I. R.R. Co. *v.* Stell, 19 Ill. 499; G. & C. U. R.R. Co. *v.* Dill, 22 Id. 265; C. & A. R.R. Co. *v.* Gretzner, 46 Id. 82; Toledo, W. & W. R.R. Co. *v.* Riley, 47 Id. 515; R.R. Co. *v.* Manley, 58 Id. 300; R.R. Co. *v.* Jacobs, 63 Id. 179; C. B. & Q. R.R. Co. *v.* Lee, 68 Id. 576; R.R. Co. *v.* Jones, 76 Id. 312; R.R. Co. *v.* Miller, 76 Id. 278; Penn. R.R. Co. *v.* Beall, 73 Penn. St. 504; McCraw *v.* N. Y. Cent. R.R., 59 N. Y. 468; G. & C. U. R.R. Co. *v.* Fay, 16 Ill. 567.

W. B. SCATES, in person.

Craig, Ch. J.—This was an action brought by Walter B. Scates, in the Superior Court of Cook County, against the Chicago and Northwestern Railway Company, to recover for personal injuries received while attempting to get upon a train of cars at the depot of the company in the city of Chicago.

In the first count of the declaration it is averred that it was the duty of the defendant to have a safe and convenient platform to the train of cars free from dangerous and unsafe obstructions, so that the plaintiff could obtain ingress to said cars in a safe and comfortable manner; that defendant in that regard did not perform its duty, but that defendant kept the platform to the cars in a negligent and unsafe manner, and kept a wooden post upon said platform in such close proximity to the railroad track that at the place where the platform abuts thereupon, the plaintiff, in the exercise of due care in the act of getting on the car to take passage to Evanston, was, by said defendant, carelessly and negligently crushed between the train and the post negligently and carelessly placed upon the platform, whereby, etc.

In the second count it is averred that it was the duty of the defendant to have at the station at Chicago a safe platform, so

that plaintiff could obtain safe ingress to the car; that defendant did not regard its duty in that behalf, but erected a wooden post upon the platform in such close proximity to the track of the railroad, that while the plaintiff, with all care and diligence, was then and there getting on the cars, the defendant moved its cars athwart and by the said wooden post and crushed and jammed the plaintiff between the car and the post, by means whereof, etc.

These are the only counts in the declaration, and on the evidence introduced under these averments the plaintiff recovered a verdict and judgment for the injuries sustained.

We do not deem it necessary to consume time in the consideration of the evidence, further than it may be necessary to determine whether the law applicable to the facts of the case was properly given to the jury. The defendant requested the court to give the following instructions, which were refused:

"2. That if, at the time the accident to the plaintiff is alleged to have occurred, the defendant's train started at the regular time of starting, and if the train had been in the proper position to receive its passengers a sufficient time to allow all passengers who were ready at the proper time to take seats in the car, and if the plaintiff, after the car started and while it was in motion, attempted to get on board, and the injury to him was received by reason of the car being in motion, he cannot recover for such injury.

"3. It was not the duty of the defendant to provide means by which the plaintiff could get on board the train of cars while the same was in motion. If the defendant had constructed and maintained a platform at a convenient and suitable place, by which passengers could safely and securely enter the cars, when the train was placed in position for the reception of passengers when the cars were not in motion, it had fulfilled its duty to the plaintiff, so far as the platform is concerned, and the plaintiff cannot recover under the averment of his declaration in this case."

No other instructions involving the same principle were given.

The depot where the accident occurred is a building containing two waiting rooms, one for gentlemen and the other for ladies. The building also contains a baggage room. The roof of the building extended over a platform, supported by a row of posts. The posts opposite the passengers' waiting rooms were several feet

from the cars on the track, but the post furthest west, which was opposite the baggage room, was only one foot and four inches from the car as it stood upon the track.

It appears from the evidence that the train had been standing on the track for some time before it started, ready to receive passengers. The plaintiff did not, however, go upon the train, as he had ample opportunity to do while it was standing on the track opposite the waiting room, but for some purpose he went into the baggage room, and while there the train started. When appellee discovered that the train was moving off he started from the baggage room door for the purpose of getting upon the train. A large man, with a valise in his hand, also started for the train, and reached the cars first. When this person reached the car-door the plaintiff was on the first step of the car. The door, however, turned out to be locked, and the man, not being able to enter the car, immediately turned and proceeded down the steps in great haste. Of course he encountered the plaintiff, who was either crowded off or pushed off on the platform. After plaintiff was thus upon the platform he held on to the iron railing of the car, and followed the moving train until he came against a post which stood near the track, in front of the baggage room, and was injured between the post and the moving car.

The fact that the train started on regular time, and ample opportunity had been given passengers to take passage before it started, as declared in the second refused instruction, is not disputed or denied. Had the plaintiff the right to attempt to get on the train while in motion; and if an injury occur in consequence of such an act, can a person recover damages for such an injury?

In *Ill. Cent. R.R. Co. v. Slatton*, 54 Ill. 133, where it appeared the train had stopped at a station and remained a sufficient time to allow passengers to leave in safety, but the deceased, not availing of that opportunity, waited until the train was in motion and then attempted to leave the train, and while so doing was thrown under the cars and killed, it was held, there appearing to have been no mismanagement of the train by the company, it was not liable. It was there said: "The proof is abundant that the train stopped an unusual time—for a time sufficient to enable the passengers to leave in safety. If the deceased did not avail of this opportunity, but chose to attempt to get off when the train

was again in motion, and this without the direction or knowledge of any employee on the train, it was his folly, and the consequences of it must rest upon him alone."

In *O. & Miss. R'y Co. v. Stratton*, 78 Ill. 88, where an action was brought to recover for injuries received by a party who attempted to get off a train while in motion, it was held, that a passenger has no right to get off a train of cars in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril, and he must bear the consequences, however disastrous. See, also, Ill. Cent. R.R. Co. v. Chambers, 71 Ill. 520.

If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on a train when in motion. If a person is guilty of such negligence in getting off a train of cars in motion as will preclude a recovery for an injury received, upon the same principle and for the same reason a person injured in getting on a train of cars in motion, and in consequence thereof, should be regarded guilty of such negligence as will prevent a recovery.

It is, however, said, that negligence is a question of fact, which should be left to a jury. This is true, and yet, if a person is guilty of gross negligence, on account of which an injury is received, or is injured for a failure to exercise ordinary care and caution to avoid danger, we apprehend it would not be error for a court to so instruct a jury.

The second instruction, which was refused, was in harmony with the views here expressed. It, in substance, directed the jury, that if they find that the train started on regular time, that it had been in proper position to receive passengers a sufficient time to allow all passengers an opportunity to take seats in the cars, and if plaintiff, after the cars were in motion, attempted to get on board, and was injured *by reason* of the car being in motion, he could not recover. The instruction was, in substance, a declaration to the jury, if plaintiff was injured on account of gross negligence on his part, or from the want of ordinary care, he could not recover.

In *Phillips v. Rens. and Sar. R.R. Co.*, 49 N. Y. 177, the court, in deciding a case where the circumstances were somewhat similar to those under consideration, said: "To hold on to the iron and run along, trying to get upon the car while the speed was

increasing, without looking to see if there was danger of collision with some object near the track or other danger to be apprehended, was not only negligence, but exhibited great, if not reckless, disregard of his safety by the plaintiff. This was the conduct of the plaintiff, as testified to by himself, and was such that, without explanation, a verdict finding him free from contributory negligence would have been unauthorized."

Here, as in the case cited, the plaintiff held on to the iron railing and followed the moving train, without looking to see whether he was liable to come in collision with any object near the track. He was familiar with the platform at the depot and its surroundings, as well as the location of the track, as he was in the habit, daily, of arriving at and departing from the same depot.

Under the evidence, we are clearly of opinion the instruction was proper and should have been given.

We now come to refused instruction No. 3. The plaintiff had averred in his declaration that defendant had not erected a safe platform at its depot in Chicago, as was its duty to do, so that plaintiff could obtain safe ingress to the car. From the evidence it appeared that a platform in front of the waiting room provided for passengers had been constructed, eighty or ninety feet long and twenty feet wide. The posts supporting the roof stood several feet from the track, so that passengers were not exposed to danger in getting off or on a train on account of the location of the posts. The platform provided at the place designed for passengers to get on the train was in good order. What more could be required?

The instruction, in substance, directed the jury, if a safe platform had been provided at a convenient and suitable place, where passengers could safely enter the cars when the train was placed in position to receive passengers, the company had fulfilled its duty to plaintiff, so far as platform was concerned. Thus far there certainly can be no objection to the instruction, but it contains another proposition; that it was not the duty of defendant to provide means by which plaintiff could get on board the train of cars while the same was in motion, and on account of this clause, we presume, it was refused. It is doubtless the duty of railroad companies to provide safe platforms at depots and regular stopping places, so that passengers can get on the train with safety

to their persons; but if a company was bound to furnish safe platforms for persons to get on a train when in motion, where must this be done? If a person has a right to get on a moving train at one place (not a station or stopping place), he has the same right anywhere along the line of the railroad; and if the company was bound to furnish platforms, the result would be the entire track would have to be thus provided with platforms. This would be imposing an unnecessary burden upon railroad companies. If a person has no right to get on a moving train, a railroad company is under no obligation to provide means to assist a person in doing something he has no right to do.

We think the instruction was correct, and should have been given.

At the request of the plaintiff, the court gave the following instruction:

"If the jury believe, from the evidence, that the injury to the plaintiff resulted from the joint carelessness of the defendant and the person who, the plaintiff says, crowded plaintiff off the steps, and while plaintiff was in the exercise of ordinary care, the jury should find for the plaintiff."

There is no pretense that there was any connection between the negligence of the railroad company and the negligence of the man who crowded the plaintiff off the car. The negligence imputed to the railroad company was, in erecting a post so near the track that plaintiff, in getting on the train, was thrown between the post and car and injured. The man who crowded plaintiff off the car had nothing to do with the post, nor did the railroad have anything to do with the conduct of the man who pushed plaintiff off the car. There could, therefore, be no joint carelessness. What was, doubtless, intended by the instruction was, that if the carelessness of the man and company both contributed to the injury, then a recovery could be had against the company. Where an act is done by the co-operation of several persons, suit may be brought against one or all of them—jointly or severally; but one person is not liable for the injury done by another, unless they act in concert. Where the acts of different persons are entirely distinct and separate, as here, there can be no joint liability. *Yeazel v. Alexander*, 58 Ill. 254.

The instruction was calculated to mislead, and should have been refused.

For the error in giving this instruction and refusing instructions two and three of defendant, the judgment will be reversed and the cause remanded.

THE CHICAGO WEST DIVISION RAILWAY COMPANY v. MILLS. (1)

Supreme Court, Illinois, September, 1878.

[Reported in 91 Ill. 39.]

PASSENGER INJURED WHILE ALIGHTING FROM STREET CAR BY SUDDEN STARTING OF CAR, COMPANY NOT LIABLE.—

Where a city railway car stopped and the conductor went into the company's office to make his report and allowed the driver to take the car a short distance to the terminus of the road, which was the usual procedure, and a passenger, as soon as the conductor left the car, attempted to alight and was injured by being thrown to the ground by the sudden starting of the car by the driver, who did not know that the passenger was getting off, the company was not chargeable with negligence.

PERSON GIVING RELEASE MUST SHOW MENTAL INCAPACITY AT THE TIME, TO AVOID IT.—A person of sound mind who seeks to avoid a release given while her mental faculties were temporarily impaired, has the burden of proving that the release was obtained when her mind was thus impaired.

APPEAL from the Circuit Court of Cook County. The opinion states the facts.

F. H. KALES, for appellant.

S. K. Dow, for appellee.

Scholfield, J—On the 13th of May, 1875, the plaintiff, in company with a friend (Mrs. Camp), took passage on one of the defendant's open summer cars, at a point on the southern part of its line, intending to go to a point some short distance south of the northern terminus of its line; but this intention was abandoned upon the coming up of a slight shower of rain, and they remained in the car (intending to return home by it) until it had been run to its northern terminus and returned south again as far

1. For report of second appeal in this case, see 105 Ill. 63, 2 Am. Neg. Cas. 654.

as the corner of State and Randolph streets, when, the car stopping, the plaintiff and her friend (Mrs. Camp) again changed their minds and concluded to leave the car at that point. Mrs. Camp left the car without difficulty, but the plaintiff, while attempting to leave it, was thrown, in consequence of the car being suddenly started forward, with great violence to the ground. The plaintiff received a severe and painful injury in consequence of the fall, and was put to serious expense for attendance of physician and care in nursing, etc.

The defense interposed was, first, that of not guilty, and secondly, that the plaintiff had released the defendant of all claim for damages growing out of the injury.

The verdict was for the plaintiff, assessing her damages at \$7,000, upon which, after overruling a motion for a new trial, the court gave judgment, and the case comes here upon the appeal of the defendant.

Under the issue presented by the plea of not guilty, the court, at the instance of the plaintiff, gave, among others, the following instructions:

"The court instructs the jury as a matter of law, that it was the duty of the defendant, as a carrier of passengers for hire, to carry such passengers safely, and, upon notice to stop a car, to give such passengers a reasonable opportunity to alight from their car, stopping a reasonable length of time for that purpose, and if the jury believe, from the evidence and circumstances proven in this case, that the plaintiff was a passenger upon one of the cars of defendant by the consent of defendant, or its agents, as conductor or driver, on or about the 13th day of May, A. D. 1875, and that the defendant stopped said car on State street, near Randolph street, for the purpose of permitting the plaintiff and other passengers to alight, and that when the plaintiff, if using due care and diligence on her part, was in the act of stepping down and off from said car while the car was standing still, the defendant by its agents, as driver or conductor, started the said car before the plaintiff had had a reasonable time to alight from said car and while she was alighting from said car, which said starting of the car, without negligence or default of plaintiff, caused the plaintiff to be thrown down and injured by breaking her bones, and that the neck of the femur, commonly called the thigh

bone, was broken or injured without any negligence or carelessness on the part of the plaintiff, then the railroad company was guilty of such negligence as would make the defendant company liable, and the verdict should be for the plaintiff, unless the jury believe from the evidence that the release read in evidence was executed by the plaintiff under an agreement which she was at the time capable of understanding and consenting to, or, after being informed thereof, ratified it, or failed to return the consideration paid to her, and thereby avoid it."

This instruction, under the evidence preserved in the record, was calculated to mislead the jury, and it should not, therefore, have been given.

It assumes that the car was stopped upon notice, for the purpose of letting passengers off. There is no proof that warrants such an assumption. No one swears that the car was stopped on notice or that the place at which it was stopped was a usual place for passengers to get on and off. It is not shown how or why the car happened to be stopped at that place. It is shown that it was customary for the conductor, on reaching Randolph street, after aiding such as desired to get off there, to go into the office of the company and make his report, allowing the driver to go alone with the car from that point to the northern terminus—a distance of about half a block—and resume his place in the car on its returning to the south side of Randolph street. While this circumstance should not be held to exonerate the defendant from the exercise of the care with which it is properly chargeable as a common carrier, yet the facts are such as to show that the defendant should not be required to anticipate that persons would be desirous of getting off the cars at any and every stoppage they might make in this short circuit. And, therefore, unless it should appear that the driver stopped the car for the purpose of letting passengers get off, or he knew that persons were actually getting off, the company is not chargeable with negligence because of his starting the car forward. Passengers, as a matter of prudence, before attempting to get off, should know that the stoppage was for the purpose of letting them get off. These circumstances are entirely left out of view by the instruction. The fact that what purports to be a release was obtained by one Blodgett, as agent for the defendant, is admitted. But it is denied, in

the first place, that plaintiff signed it; and in the second place, it is contended that if she did sign it, she did so while her mind was in a state of unconsciousness caused by opiates which she had taken to allay the intense pain from which she was suffering.

On this point, the court, at the instance of the plaintiff, gave, among others, this instruction:

"The court instructs the jury, that under the issues in this case, the burden of proof is upon the defendant to show that the alleged written release of plaintiff, offered in evidence by defendant, was the conscious act and deed of said defendant, or executed in compliance with a previous agreement made when she was mentally capable of making and understanding it." This was clearly erroneous.

In *Lily v. Waggoner*, 27 Ill. 397, the rule was thus laid down: "The legal presumption is, that all persons of mature age are of sane memory. But after inquest found, the presumption is reversed, until it is rebutted by evidence that he has become sane. When the transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it, but it is otherwise if it took place afterwards." See, also, *Fisher v. People*, 23 Ill. 283, and *Menkins v. Lightner*, 18 Ill. 282. There is no pretense here that the plaintiff was actually insane—her mental faculties were simply temporarily impaired—and it devolved upon her to show that the release was obtained when her mind was thus impaired—not upon the defendant to show that her mind was not impaired when it was obtained.

The question was one upon which there was a conflict of evidence, and it should have been fairly submitted to the jury.

The evidence is far from satisfactory to our minds that the negligence of the defendant was gross and that of the plaintiff slight, in comparison with each other, which is essential to authorize a recovery.

For the errors indicated, however, the judgment is reversed and the cause remanded.

THE EAGLE PACKET COMPANY V. DEFRIES. (1)

Supreme Court, Illinois, May, 1880.

[Reported in 94 Ill. 598.]

FALLING OF STAGE-PLANK *PRIMA FACIE* EVIDENCE OF NEGLIGENCE OF STEAMBOAT COMPANY.—The fact that a stage-plank used by passengers in landing from a steamboat fell while a passenger, in the exercise of due care, was walking over it, is *prima facie* evidence of negligence on the part of the steamboat company.

PASSENGER INJURED WHILE LANDING FROM STEAMBOAT —NEGLIGENCE OF COMPANY.—Where it appeared that the wind blew the end of a steamboat around so that a stage-plank fell while the plaintiff was walking on it to the shore, and it did not appear that the boat was fastened to the wharf, the steamboat company was liable for the injuries sustained by the passenger.

WHEN RELEASE NOT BINDING.—A release obtained by a physician of the defendant from the plaintiff, an illiterate woman, was not binding upon her.

EVIDENCE OF PECUNIARY CIRCUMSTANCES.—The exclusion of evidence of the pecuniary circumstances of the plaintiff offered by the defendant was proper.

APPEAL from the Circuit Court of Jersey County.

Action brought by appellee against appellant to recover damages for injuries sustained by her whilst a passenger on one of appellant's steamboats. The declaration alleged that appellee became a passenger on appellant's steamboat *Spread Eagle*, to be carried from St. Louis to Grafton, and that it was the duty of the defendant, upon the arrival of said steamboat at Grafton, to give the plaintiff an opportunity of safely alighting therefrom, and then and there to secure said steamboat to the wharf, and to place proper and suitable stage-planks or gangways from said steamboat to the wharf, and to have said stage-planks or gangways properly secured, to enable the plaintiff to walk safely from the said steamboat to the wharf; yet the defendant did not regard its duty in that behalf, but, on the contrary, on the arrival of the steamboat at Grafton, and while the plaintiff, with all due care and diligence, was walking from the steamboat to the wharf upon

1. Cited in *C. R. I. & P. R. Co. v. Lewis*, 109 Ill. 120, 130; *N. C. St. R'y Co. v. Cotton*, 140 Ill. 486, 495.

the stage-plank or gangway provided by the defendant, said stage-plank or gangway, by, through and in consequence of the negligence of the defendant, fell from the said steamboat and upon the plaintiff, by means whereof the plaintiff's leg and other parts of her body were greatly bruised, hurt and wounded, whereby the plaintiff was obliged to and did lay out large sums of money in and about endeavoring to be cured, and also the plaintiff then and there became and was sick, lame and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain, etc.

To this declaration the defendant pleaded the general issue and a special plea of release, upon which issues were joined and a trial had, resulting in a verdict and judgment for the plaintiff for the sum of \$800, from which judgment this appeal was prosecuted.

The evidence introduced by the plaintiff tended to show the following facts: On April 15, 1875, plaintiff embarked on the *Spread Eagle* at St. Louis, bound for Grafton. Upon paying her fare and securing her ticket, she went to the room of the stewardess and sat down to take a smoke, where she remained until the arrival of the boat at Grafton, which was after dark. She did not leave the boat with the other passengers, as she was not aware the boat had arrived until informed thereof by the stewardess, when she at once started up. She gave her ticket to the steward and started to leave the boat, carrying with her a large basket without being offered any assistance by the steward or anyone else. One of the deck hands crossed the stage-plank just before her. While she was crossing, the stage-plank fell with her, from which she received a severe injury to her leg, which still caused her pain at the time of the trial. On the 19th of April, 1875, the plaintiff signed a receipt releasing the defendant from all liability in consideration of the sum of \$40, but she could neither read nor write, nor did she understand the nature and effect of the paper she was signing.

The evidence introduced by the defendant tended to show that the falling of the stage-plank was caused by the wind blowing the boat around. It also tended to show that the receipt executed by the plaintiff was procured by the physician whom the defendant had employed to attend the plaintiff; that she understood what the paper was when she signed it, and that the physi-

cian explained to her that the agents of the company had expended the money for her benefit, and wanted something to show the company what the money had been expended for.

The court gave ten instructions on behalf of the plaintiff, refused two requested by defendant and gave six of its own motion. The assignments of error call in question the rulings of the court below in the giving and refusing of instructions, the admission and exclusion of evidence, and in overruling the motion for a new trial.

MORRIS A. LOCKE and DUMMER, BROWN & RUSSELL, for appellant.

SNEDEKER & HAMILTON, for appellee.

Dickey, J.—From a careful examination of the evidence, we are satisfied the plaintiff was entitled to a verdict in her favor. There is nothing in the record tending to prove a want of ordinary care on her part, which could have contributed to her injury. It is, however, insisted there is an entire absence of proof of negligence on the part of defendant. This view of the case results from a misapprehension of the legal effect of the evidence introduced by the plaintiff. It was clearly the duty of defendant to provide means by which plaintiff could safely go from the boat to the wharf; and the fact that the stage-plank used for that purpose fell whilst plaintiff, in the exercise of due care, was walking over it, is *prima facie* evidence of negligence on the part of the defendant in the performance of that duty, and casts upon the defendant the burden of proving the falling of the plank was the result of an accident for which defendant was not responsible. This position is sustained by the ruling of this court in *Pitts. Cin. and St. Louis R'y Co. v. Thompson*, 56 Ill. 138, and of the Supreme Court of the United States in *Railroad Co. v. Pollard*, 22 Wall. 342, and in *Stokes v. Saltonstall*, 13 Pet. 181. In the last-named case it is held that the upsetting of a stagecoach, by which a passenger is injured, is *prima facie* evidence of negligence on the part of the driver, and casts upon the proprietor the burden of showing the driver was in every respect qualified, and acted with reasonable skill and the utmost caution.

When, therefore, in the case at bar, it is shown the plaintiff has been injured by the falling of the stage-plank, the burden is cast upon the defendant to show this was caused by an accident which,

by the exercise of ordinary care on the part of defendant's servants, could not have been avoided. It is true, the evidence tends to show the end of the boat was moved around by the wind, and this caused the stage-plank to fall; but it does not appear the boat was fastened to the wharf in any way, or that it could not have been so fastened as to have prevented its being moved by the wind. The evidence wholly fails to establish ordinary care on the part of the defendant to prevent the falling of the stage-plank.

The jury properly found the plea of release was not sustained. The evidence shows that plaintiff, at the time of the execution of the receipt, was an illiterate woman, unable to read or write, and that it was obtained from her during her illness consequent upon her injury, and by the physician employed by defendant to attend her, and in the absence of any of her friends to whom she could look for advice. The physician explained to her that the officers of the company had expended the amount of money named in the receipt for her benefit, and wanted something to show the company what the money had been expended for, and this was all the explanation he made. Taking into consideration all these facts, and especially the fact that the receipt was obtained by the attending physician, we are of opinion it cannot be held binding upon her.

Inasmuch as, upon the evidence, the jury would not have been justified in rendering a verdict for the defendant, it is only necessary for us to consider such of the alleged erroneous rulings of the court below as may have affected the amount of the damages awarded the plaintiff. The only rulings of this character of which complaint is made, are the giving by the court below of the plaintiff's third, fifth and seventh instructions, and the refusal to permit defendant to introduce evidence as to the pecuniary circumstances of plaintiff.

It is insisted that, as the declaration did not allege plaintiff had suffered a *permanent* injury, it was error to give the third and seventh instructions, which authorized the jury to award the plaintiff damages for such permanent injury as the evidence showed she had sustained. This position is untenable. The declaration expressly alleges that the plaintiff "then and there became and was sick, lame and disordered, and so remained for a long time, to wit: hitherto," etc. The permanency of plaintiff's injury was merely

evidence to be considered by the jury in determining the severity of the plaintiff's sickness, lameness and disorder, and the rules of pleading do not require the plaintiff to set forth in his declaration the evidence upon which he relies.

The objection made to the fifth instruction is, that it authorized the awarding of exemplary damages if the evidence showed willful negligence on the part of the defendant, and that there was no evidence on which to base the instruction. Conceding this instruction should not have been given, still, the damages awarded the plaintiff are not so large as to justify us in the belief the jury gave any exemplary damages, and we would not reverse the judgment for this error which did not harm.

It is also insisted the court below erred in refusing to admit evidence offered by the defendant as to the pecuniary circumstances of the plaintiff. We know of no rule of law, and have been referred to none by counsel, holding that in an action of this character it is competent to show the financial standing of the plaintiff. The mere fact that plaintiff in this case made some statements, without objection by defendant, as to her pecuniary circumstances, does not require the court upon the application of defendant to try immaterial issues.

There is no substantial error in this record, and the judgment of the court below must therefore be affirmed.

THE CHICAGO CITY RAILWAY COMPANY v. MUMFORD. (1)

Supreme Court, Illinois, March, 1881.

[Reported in 97 Ill. 560.]

PASSENGER INJURED WHILE ALIGHTING FROM STREET CAR BY CAR STARTING WITH SUDDEN JERK, COMPANY LIABLE. - Where it appeared that a passenger notified the driver of a street car that he desired to alight at a certain place, and when the place was reached, the driver notified him, and when he was in the act of stepping off, the car started up with a sudden jerk, and he was thrown to the ground and injured, the company was liable.

1. Cited in *N. C. St. R'y Co. v. Williams*, 140 Ill. 275, 282, 2 Am. Neg. Cas. 684.

PASSENGER ALIGHTING FROM MOVING CAR AND INJURED MAY RECOVER FOR INJURIES.—If while the car was slowly moving, the passenger attempted to step off and the driver started the car with a sudden jerk without looking to see whether passengers were in the act of alighting or not, the plaintiff could recover for the injuries.

APPEAL from the Superior Court of Cook County.

Action brought by Benjamin Mumford against the Chicago City Railway Co. to recover damages for a personal injury resulting from the negligence of the company.

On the second trial of the case, the jury found for the plaintiff, and assessed his damages at \$8,000. The plaintiff entered a remittitur of \$3,000. A motion for a new trial was overruled, and judgment entered against the defendant for \$5,000.

HITCHCOCK, DUPEE & JUDAH, for appellant, cited: *Potter v. C. & N. W. R.R. Co.*, 21 Wis. 377; *C. & A. R.R. Co. v. Gretzner*, 46 Ill. 74; *Clark v. Eighth Ave. R.R. Co.*, 36 N. Y. 135; *O. & M. R.R. Co. v. Stratton*, 78 Ill. 88; *Ill. Cent. R.R. Co. v. Slatton*, 54 Id. 133; *C. & A. R.R. Co. v. Randolph*, 53 Id. 510; *Trow v. Vermont Cent. R.R.*, 24 Vt. 487; *Filer v. N. Y. Cent. R.R. Co.*, 49 N. Y. 47; *Chicago v. Brophy*, 79 Ill. 277; *C. & A. R.R. Co. v. Wilson*, 63 Id. 167; *C. & A. R.R. Co. v. Murray*, 71 Id. 601.

PECKHAM & BROWN, for appellee.

Craig. J.—This was an action on the case, brought by Benjamin Mumford against the Chicago City Railway Company—a corporation operating street cars in the city of Chicago—to recover damages for a personal injury received while in the act of getting off the car of the defendant near the Palmer House, in Chicago. On the trial of the cause in the circuit court the plaintiff obtained a judgment, which the railway company seeks to reverse, first, on the ground that the plaintiff failed to show that he was free from negligence which contributed to the injury. Second, that the court erred in refusing defendant's third and fourth instructions. Third, that the damages are excessive.

It is an undisputed fact that the plaintiff notified the driver who was in charge of the car, soon after he went in the car, that he desired to stop at the Palmer House, and that the driver promised to stop and let him off at that place, but whether the accident occurred from the negligence of the driver, or through

manent. The thigh-bone was fractured, which rendered plaintiff a cripple for life. Besides, he was otherwise injured.

It is true the damages are high, but we do not regard the amount of the judgment so excessive as to justify a reversal on the ground, alone, of excessive damages.

After a careful examination of the whole record, we are of opinion that no substantial error appears.

The judgment will, therefore, be affirmed.

CHICAGO & ALTON RAILROAD COMPANY v. BONIFIELD. (1)

Supreme Court, Illinois, September, 1882.

[Reported in 104 Ill. 223.]

QUESTION OF FACT NOT REVIEWABLE.—The finding of a jury that the act of a passenger in alighting from a train was slight negligence and that of the employees of the railroad company in starting its train was gross negligence, being sustained by the Appellate Court, is conclusive on this court.

GROSS NEGLIGENCE TO ALIGHT FROM SWIFTLY MOVING TRAIN.—Alighting from a train in motion is negligence that will preclude all recovery, where the company is not at fault and the train has considerable speed, but it is not necessarily true where it is a question of comparative negligence.

It is not negligence *per se* to alight from a moving train.

COMPARATIVE NEGLIGENCE QUESTION FOR JURY.—Where it appeared that a passenger in alighting from a train at a station was thrown by the motion of the cars or fell on the platform and sustained injuries from which he died, and both the railway company and the passenger were negligent, the question of negligence and its comparison was one of fact, and having been determined in favor of the passenger by the jury, it is not the province of this court to review it.

APPEAL from the Appellate Court for the Third District. Heard in that court on appeal from the Circuit Court of McLean County. The facts are stated in the opinion.

WILLIAMS, BURR & CAPEN, for appellant.

STEVENSON & EWING, for appellee.

1. Cited in *C. & N. W. R'y Co. v. Moranda*, 108 Ill. 576, 581; Ill. Cent. R.R. Co. v. Haskins, 115 Ill. 300, 304; *L. E. & W. R. Co. v. Middleton*, 142 Ill. 550, 558; *Clayton v. Brooks*, 150 Ill. 97, 105; *C. & A. R. Co. v. Byrum*, 153 Ill. 131, 137, 2 Am. Neg. Cas. 719.

Walker, J.—It appears, and it is not disputed, that on the 28th day of October, 1880, Peter Ely, deceased, having attended a political mass meeting at Bloomington, at about half-past ten o'clock at night took the cars at that place for the town of McLean, where he resided. On the arrival of the train at that place, in alighting from the train, he was thrown by the motion of the cars, or fell on the platform, receiving injuries from which he died some three months afterwards. He brought suit in his lifetime to recover damages from the company for the injury, but having died before a trial, the suit was revived in the name of his administrator, to recover for his widow and next of kin. On a trial the jury found a verdict in favor of plaintiff for \$1,400, and after overruling a motion for a new trial, the court rendered a judgment on the verdict. Defendant appealed to the Appellate Court, and on a trial therein the judgment was affirmed, and the case is brought to this court by appeal.

Each side contends that the other was guilty of negligence, and the evidence tends to prove that both were. But appellee claims that even if this be true, the negligence of deceased was slight, and that of the company was gross. It is contended for the company that the negligence of the deceased was not slight in comparison with that of the employees of the company, and that if guilty of negligence, it was not gross in comparison with that of deceased. The question of negligence and its comparison is one of fact, and its determination is for the jury, and the question of whether the jury have found correctly can only be reviewed by the Appellate Court.

It is claimed that alighting from a train in motion is such negligence as to preclude all recovery, whatever the circumstances. This may be true, and, no doubt, is, where the company is not in fault, and the train has considerable speed; but it is not necessarily true where it is a question of comparative negligence. A train might be barely in motion—moving so slowly as to be scarcely perceptible on close inspection—when to get off would be attended with no danger whatever. To hold such an act, under such circumstances, gross negligence *per se*, would find no sanction in reason or justice. It would violate the experience of all persons, and be contrary to the reason of all men. But to leave a train when running at a high rate of speed, as was done

in some of the cases to which reference is made in argument, is, and must be, gross negligence. And it may be perilous to get off in the dark when running at a rate of speed that would be safe in the light of day. The value of a certain fact in evidence depends largely on the attendant circumstances. An act which is gross negligence in one case is not in another, owing to modifying circumstances. Then, what acts are negligent must depend upon other acts in each case, and what is said in a case of negligence is with reference to that case. But few acts can be said to be negligent *per se*, hence stern and unbending rules as to the weight of particular acts as evidence cannot be announced for all cases and under all circumstances. Such rules must necessarily be more or less flexible, or be under many cases confined to the cause being tried. All persons in the profession know that a small circumstance in evidence frequently rightfully changes the result of a trial and recovery.

It is the long settled doctrine of this court that negligence is a fact, the finding of which is clearly within the province of a jury; and it is equally as well settled that a question of comparative negligence is as clearly within its province. (1) The legislature

1. NOTE ON COMPARATIVE NEGLIGENCE.—The doctrine of comparative negligence is now abrogated in Illinois.

In *Galena & Chicago Union R. Co. v. Jacobs*, 20 Ill. 478, the doctrine of comparative or contributory negligence was first announced. The whole subject was re-examined and qualified in *C. B. & Q. R.R. Co. v. Johnson*, 103 Ill. 512, and was again re-examined and modified in *City of Chicago v. Sterns*, 105 Ill. 554. See, also, *Penn. Co. v. Boylan*, 104 Ill. 595; *Abend v. T. H. & I. R. Co.*, 111 Ill. 202; *H. & St. J. R.R. Co. v. Martin*, 111 Ill. 219, 2 Am. Neg. Cas. 661; affirming 11 Ill. App. 386, 2 Am. Neg. Cas. 491.

Subsequent cases, however, renounce the doctrine of comparative

negligence. In *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358 (an action to recover for the death of a person killed by a railway train), the court held that the doctrine of comparative negligence, as announced in the earlier cases, was no longer the law in Illinois, and was not to be regarded as a correct rule of law applicable to this class of cases. See, also, *City of Mansfield v. Moore*, 124 Ill. 133; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *L. S. & M. R'y Co. v. Hessions*, 150 Ill. 542.

In *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, it was *held*, that an instruction announcing the now obsolete doctrine of comparative negligence is cured by others which require the exercise of ordinary care by plaintiff as a condition of recovery. In such

has deprived this court of the power of reviewing controverted facts passed upon by a jury. That power has been conferred upon the Appellate Courts, and we have been deprived of its exercise. We are compelled to take them as found by those tribunals, and have no discretion in the matter. In this case it was a controverted fact whether the act of deceased in passing from the train at the time was slight negligence, and the negligence of the company in starting its train as it did, when compared with that of deceased, was gross. These facts have been found by the jury and the Appellate Court, and we have no right to disregard their finding.

In view of what we have here said, there was no error in giving and refusing instructions of the court on the trial below. If a plaintiff establishes a liability on the part of a defendant, he has a right to recover, and it is not error to so instruct the jury, leaving them, if they so find the liability, to find in his favor, and the right to fix the amount of damages from the evidence. Appellee's instructions so inform the jury, and are not erroneous. There was no error in modifying appellant's instructions that were given, as they conformed to the law when modified. Those refused were erroneous, and were properly rejected. They were not in conformity with the settled law of this court, and the error is obvious.

It is urged that the damages are excessive. If the amount of case it was also *held*, that the expression "some slight negligence" is equivalent to "some negligence which is slight," and that these words, in an instruction on comparative negligence, do not amount to an instruction to the jury that plaintiff's negligence was, in fact, slight.

In *City of Lanark v. Dougherty*, 153 Ill. 163, where objection was taken to instructions because they ignored the doctrine of comparative negligence, Magruder, J., said, that "the doctrine of comparative negligence is no longer the law of this court. The instructions in the present case require the jury to find, that the

plaintiff was exercising ordinary care, and that the defendant was guilty of such negligence as produced the injury. This was sufficient, without calling the attention of the jury to any nice distinctions between different degrees of care or of negligence." (Citing *Village of Mansfield v. Moore*, 124 Ill. 133.)

In *Penn. Coal Co. v. Kelly*, 156 Ill. 9, 17, the court in referring to an instruction as to negligence *held*, that "the instruction attempts to lay down the old doctrine of comparative negligence, which is no longer in force in this State, and for that reason should have been refused."

damages in a recovery is not a fact to be found by a jury, but is a question of law that may be reviewed by this court, the amount found in this case, if we may review them, is not so large as to require a reversal. That the rule for the measure of damages is a question of law, there can be no question, but whether the amount found is a question of law, we decline to determine until a case is presented that demands its decision.

The judgment of the Appellate Court is right, and must be affirmed.

**WABASH, ST. LOUIS & PACIFIC RAILWAY CO.
V. RECTOR. (1)**

Supreme Court, Illinois, September, 1882.

[Reported in 104 Ill. 296.]

RELATION OF CARRIER AND PASSENGER.—The relation of carrier and passenger is created by the purchase of a ticket to carry the passenger between stations on a railway.

NEGLIGENCE OF PASSENGER WILL NOT EXCUSE ASSAULT BY CONDUCTOR.—Carelessness or negligence on the part of a passenger will not excuse a wanton and malicious attack on him by the conductor or other servant of a railway company. No matter how negligent a passenger may be for his safety, that will not warrant the infliction of a willful injury by a railroad employee.

ASSAULT BY CONDUCTOR ON PASSENGER.—Where it appeared from the evidence that the plaintiff did not attempt to board the train until it had gained considerable speed, and then caught hold of the rail at the end of the rear car as it was passing him and stepped on the bottom step and was swung around with his back to the rail, and after an effort swung back and with his right hand took hold of the other guard rail, and while in that position was wantonly and willfully assaulted by the conductor who attempted to board the train at the same time and place, and the court charged that if the jury believed from the evidence, that the plaintiff, under all the circumstances, in attempting to board the train acted as a reasonably prudent person would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by the plaintiff resulting from the willful or wantonly malicious conduct of the servant of the defendant acting in the line of his duties, the defendant would be liable for such injuries, it was *held* to be error under the circumstances of this case.

1. Cited in *Harrison v. Ely*, 120 Ill. 83, 85; *C. & A. R. Co. v. Arnol*, 144 Ill. 261, 269, 2 Am. Neg. Cas. 694.

PUNITIVE DAMAGES NOT GIVEN AS MATTER OF RIGHT.—An instruction that as matter of law an injured party is “entitled” to vindictive or punitive damages is error.

INSTRUCTION IGNORING IMPORTANT FACT.—Where instructions to the jury ignore the fact that an injury to the plaintiff might have been caused by his own imprudent act, viz.: an injury to his spine by being twisted in an attempt to board a moving train, they are cause for reversal.

APPEAL from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Fulton County. The facts appear in the opinion.

F. T. HUGHES, for appellant, cited: *Field on Damages*, 96, 167; *C. & N. R’y Co. v. Scates*, 90 Ill. 586; *R.R. Co. v. Aspell*, 23 Pa. St. 147; *Nichols v. R’y Co.*, 106 Mass. 463; *Harvey v. R’y Co.*, 116 Mass. 269; *Ill. Cent. R.R. Co. v. Able*, 59 Ill. 131; *O. & M. R.R. Co. v. Schiebe*, 44 Ill. 460; *Ill. Cent. R.R. Co. v. Slatton*, 54 Ill. 133; *Harris v. Hatfield*, 71 Ill. 310; *Bosworth v. Swanson*, 10 Metc. 363; *Heland v. Lowell*, 3 Allen, 408; *Ill. Cent. R.R. Co. v. Hetherington*, 83 Ill. 510; *Middleton v. Fowler*, Salk. 282; *Roe v. Birkenhead R.R. Co.*, 7 Eng. L. & Eq. 546; *Story on Agency*, § 456; *Angell on Carriers*, § 604; *Hilliard on Torts*, 432; *Cooley on Torts*, 127, 533; *Wood’s Master and Servant*, §§ 319, 555, 598; 2 *Kent’s Comm.* 260; *Thomp. on Neg.* 885; *Pierce on Rail.* 279, 305, 306; *Bryant v. Rich*, 106 Mass. 180; *Little Miami R.R. Co. v. Wetmore*, 19 Ohio St. 110; *McKinley v. C. & N. W. R’y Co.*, 44 Iowa, 321; *Crocker v. C. & N. W. R’y Co.*, 36 Wis. 657; *McKeen v. Citizens’ R’y Co.*, 40 Mo. 88; *Goddard v. G. T. R.R. Co.*, 57 Me. 202; *Shear. & Redf. on Neg.* § 601; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Hagan v. Prov. R.R. Co.*, 3 R. I. 88; *Turner v. N. B. R.R. Co.*, 34 Cal. 594; *Ken. & G. R.R. Co. v. Dills*, 4 Bush, 593; *C. & R. I. R.R. Co. v. McKean*, 40 Ill. 218.

GRAY & WAGGONER and L. W. JAMES, for appellee, cited: *Redf. on Carriers*, 269, 352; *St. L. A. & C. R’y Co. v. Dalby*, 19 Ill. 353; *Tol. W. & W. R’y Co. v. Harmon*, 47 Ill. 299; *Ill. Cent. R.R. Co. v. Reed*, 37 Ill. 508; *N. W. R.R. Co. v. Hack*, 66 Ill. 239; *C. B. & Q. R.R. Co. v. Dickson*, 63 Ill. 157; *Noble v. Cunningham*, 74 Ill. 51; *C. B. & Q. R.R. v. Bryan*, 99 Ill. 126; *C. & N. W. R.R. Co. v. Moranda*, 93 Ill. 303; *Goddard v. G. T. R.R. Co.*, 57 Me. 202; *A. & G. W. R.R. Co. v. Dunn*, 19 Ohio, 162; *Han-*

son *v.* N. A. R.R. Co., 57 Me. 84; 1 Am. R'y Cas. (Smith & Bates' notes) 127; Sleeth *v.* Wilson, 9 Car. & P. 607; Bryant *v.* Rich, 106 Mass. 180; Coleman *v.* N. Y. & N. H. R.R. Co., 106 Mass. 160; Brokaw *v.* N. J. R.R. Co., 3 Vroom, 328; Kline *v.* C. P. R.R. Co., 37 Cal. 327; Passenger R.R. Co. *v.* Young, 21 Ohio St. 518; Sherley *v.* Billings, 8 Bush, 147; Ill. Cent. R.R. Co. *v.* Parks, 88 Ill. 375; C. B. & Q. R.R. Co. *v.* Boyne, 1 Bradw. 473; Same *v.* Bryan, 90 Ill. 126; Hawk *v.* Ridgeway, 33 Ill. 473; Chicago *v.* Martin, 49 Ill. 245; Ill. Cent. R.R. Co. *v.* Hammer, 72 Ill. 348; Tol. P. & W. R'y Co. *v.* Patterson, 63 Ill. 304; Atl. & G. W. R.R. Co. *v.* Dunn, 19 Ohio St. 162; Pittsburg, A. & M. R.R. Co. *v.* Donahue, 70 Pa. St. 119.

Scott, Ch. J.—This action was brought by Henry J. Rector against the Wabash, St. Louis and Pacific Railway Company, and Theodore F. Kent, to recover for personal injuries. No service of process was had on Kent, and the action proceeded against the railway company alone. The facts necessary to an understanding of the questions of law to be considered may be briefly stated. Plaintiff desired to become a passenger on defendant's cars from Smithfield to Canton, and for that purpose purchased a ticket at the former station, that would entitle him to become a passenger on defendant's road. It appears plaintiff delayed attempting to enter the cars until after the train was in motion, although plenty of time was allowed for that purpose, had he desired to do so. By the time he did attempt to get aboard, the train had acquired considerable speed. As the end of the rear car came opposite plaintiff, he caught hold of the rear guard-rail and stepped with one or both feet on the bottom step and swung around to the rear of the car. The evidence tends to show a collision occurred between plaintiff and the conductor, who was attempting to board the train at the same time and at the same platform. In an effort to recover himself plaintiff swung back, and with his right hand took hold on the other guard-rail, and it was while he was in that position, it is alleged, he was violently and willfully assaulted by the conductor. The injuries sustained by plaintiff were very serious indeed, and no doubt of a permanent character. On the trial in the Circuit Court the jury returned a verdict for plaintiff in the sum of \$14,000. After a remittitur of \$4,000 was entered, the court overruled defendant's motion for a new trial, and rendered

a judgment on the verdict for \$10,000. The judgment was affirmed in the Appellate Court, and defendant brings the case to this court on appeal.

With the facts of the case, further than they may be necessary to an understanding of the questions of law raised, this court will not concern itself. They have been ascertained by the Appellate Court, whence this cause comes, and that finding is, of course, under the statute, conclusive on this court. Some further reference to the facts may be necessary to render the legal questions discussed intelligible in their application to the case. As has been seen, plaintiff purchased a ticket on defendant's railway between two stations, and that fact created the relation of carrier and passenger, and the law imposed duties arising out of that relation, both on the carrier and the passenger. It is the duty of every railroad company to cause its passenger trains to stop at each station advertised as a place of receiving and discharging passengers a sufficient length of time to receive and let off passengers with safety, and to provide a reasonably safe way of reaching and departing from their cars at all usual stations, and it is the duty of passengers to exercise ordinary care for their safety on attempting to take passage on railway cars. These respective duties, as well as all others that tend to the security of passengers, neither party ought to omit.

No complaint is made in this case that defendant did not cause its train to stop at the station a sufficient length of time to allow all passengers that might wish to do so to get off or on its cars with safety. It is an admitted fact, plaintiff, although holding a ticket entitling him to passage, did not attempt to get aboard defendant's cars until the same began to move away from the station. After the cars were in motion, and had acquired considerable speed, plaintiff undertook to get on the cars by catching hold of the railing of the rear car, and while he was holding to it with both hands as well as he could, he was injured by a violent assault made by the conductor and was otherwise injured. It is at this point in the case the first serious error occurs in the action of the trial court in giving instructions for plaintiff. The first of the series is as follows: "If the jury believe, from the evidence, that the plaintiff, under all the circumstances, in attempting to board defendant's train, if he so attempted, acted as a reasonably pru-

dent person would have done under like circumstances, without negligence, and used ordinary care to prevent accident, and that injuries were sustained by the plaintiff resulting from the willful or wantonly malicious conduct of the servant of the defendant acting in the line of his duties, the defendant would be liable for such injuries." Under some circumstances the principle of this instruction might be applicable, but it was calculated to mislead the jury under the admitted facts of this case. While this charge must be condemned in its application to the facts of this case, it must not be understood that any carelessness or degree of negligence on the part of a passenger would excuse a wanton and malicious attack on him by the conductor or other servant of the company. No matter how negligent a passenger may be for his safety, that would not warrant the infliction of a willful injury by a railroad employee.

The tenth charge of the series does not state a correct principle of law, and would be faulty in its application to any state of facts. It is as follows: "The court instructs the jury that if they believe, from the evidence in this case, that the plaintiff in this case, having a lawful right to ride on the defendant's train, was, at and within the county of Fulton, and State of Illinois, wantonly, willfully and maliciously expelled from said train by the conductor thereof while in the exercise of his lawful or implied duty about the business of the railroad company, as the servant and agent of defendant, and that by reason of such act the said plaintiff then and there sustained actual, serious and permanent injury and damage, then the plaintiff is not limited in his recovery to such actual damages sustained, but the plaintiff is entitled, in addition thereto, to such additional damages as the jury may in their judgment assess by way of punishment for such act." The vice of this instruction consists chiefly in the fact it states the rule as to vindictive or punitive damages broader than the law will warrant. Where an injury is wantonly and willfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for such willful injury, but it is not understood the injured party is "entitled" to such damages as a matter of right, and an instruction that tells the jury, as a matter of law, the injured party is "entitled" to such damages, goes too far, and is for that

reason vicious. A party may recover the actual damages inflicted by the wrongdoer, but whether he may have damages in addition thereto, rests largely in the discretion of the jury, under the circumstances, and they should be left free to exercise their judgments in that respect. It was prejudicial error to tell the jury, as the court did in this charge, that plaintiff was "entitled" to such damages above the actual damages sustained. It may be it was a case where the jury might give exemplary damages, but that was a question the court could not pass upon without invading the province of the jury.

But there is a vice common to most of the instructions given for plaintiff that must have been hurtful to the defense. Many of them ignore the fact the evidence tends to establish, viz., that plaintiff might have been injured otherwise than by the violence of the conductor. Whatever injuries he may have suffered other than from the assault of the conductor, were attributable to his own negligence, and for which defendant was in no way responsible. That which most seriously afflicts plaintiff, is some kind of an injury to the spine, and all the physicians say the injury of which he complained most might have been produced by a strain or wrenching of the body. One of them says it might "result from a very bad strain or twist of the body," and another, "that it might be produced by a very powerful twist or wrench of the body." The description given by plaintiff of the transaction shows he must have sustained a very severe strain or wrenching of the body in the attempt to get on the train when in motion. His own account is, that when he caught hold of the railing he "swung clear" and had great difficulty in regaining his balance. A witness near at hand, and who saw all that took place, says plaintiff "stepped on the car and swung around with his back to the back end of the railing." All the witnesses agree the train had acquired considerable speed before plaintiff attempted to get aboard of it, and there must, of necessity, have been a strain more or less severe to the body. Whether plaintiff was injured in that way was a question that ought to have been more definitely submitted to the jury. The instructions should have excluded from the jury all idea that there could be any recovery for injuries sustained by plaintiff on account of an imprudent attempt to board the train when in motion, other than that produced by the wrong-

ful conduct of defendant's servants in charge of the train. That the instructions did not do, and the error in this regard may account in some measure for the unusually large verdict rendered. It is not sufficient in a case of this kind that some of defendant's instructions may have stated the law correctly on this branch of the case. Plaintiff's instructions should have done the same thing, so that the jury could not have been misled by considering one set or the other of the charges given.

There may be slight errors in other instructions, but they have not been deemed to be of sufficient importance to be remarked upon. On another trial the Circuit Court will make the instructions conform, as near as may be, to the views expressed in this opinion.

The judgment of the Appellate Court will be reversed, and the cause remanded, with directions to reverse the judgment of the Circuit Court, and remand the cause for a new trial.

CHICAGO WEST DIVISION RAILWAY COMPANY v. MILLS. (1)

Supreme Court, Illinois, November, 1882.

[Reported in 105 Ill. 63.]

STARTING STREET CAR WHILE PASSENGER IS ALIGHTING.—

A street car being stopped at a usual place of alighting, a passenger has the right to alight without making any request to or obtaining permission from the persons in charge of the car, and it is immaterial whether the car was stopped at the request of the passenger or not, and if the car is started while the passenger is alighting and he receives injuries, he may recover damages.

RELEASE OF CLAIM WHEN NOT BINDING.—A release of all claim against a railway company is not binding when it appears that the person executing the release was lacking in intelligence caused by being under the influence of opiates.

APPEAL from the Appellate Court for the First District. Heard in that court on appeal from the Circuit Court of Cook County.

1. Cited in *C. & N. W. R'y Co. v. Snyder*, 128 Ill. 658.

For a report of the first appeal in this case, 91 Ill. 39, see p. 630 *ante*.

On the 4th of May, 1876, appellee sued appellant in the Cook Circuit Court in an action on the case for negligence. The general issue, and also special pleas of accord and satisfaction, and a special plea of release, were pleaded. The *similiter* was added to the general issue. To the plea of accord and satisfaction it was replied that plaintiff, at the time she received said payment, etc., was unconscious and wholly incapable of understanding the meaning and effect of what she did, etc., and to the special plea of release, *non est factum* was replied. Subsequently the parties stipulated, in writing, that the plaintiff, under her replication of *non est factum*, might show any fact or facts, or any defense which it would be competent for her to prove under any special replication well pleaded to the pleas of release, and that the defendant might meet such facts or defense in the same manner and with like effect as they could do under any rejoinder legally interposed. At the May Term, 1877, of that court, trial was had, resulting in a judgment for the plaintiff. The defendant appealed to this court, and the judgment of the Circuit Court was, at our September Term, 1878, reversed, and the cause remanded for a trial *de novo*. After the remanding of the cause, and at the January Term, 1882, of the Cook Circuit Court, another trial was had, resulting, as the first, in a judgment in favor of the plaintiff. From that judgment appeal was prosecuted to the Appellate Court for the First District, and that court, at its March Term, 1882, affirmed the judgment of the Circuit Court. This appeal is from that judgment. The errors assigned are discussed in the opinion.

FRANCIS H. KALES, for appellant, cited: C. & N. W. R'y Co. *v.* Dimmick, 96 Ill. 42; C. B. & Q. R.R. Co. *v.* Johnson, 103 Id. 512; Ill. Cent. R.R. Co. *v.* Green, 81 Id. 19; R.R. Co. *v.* Delaney, 82 Id. 98; Schmidt *v.* R.R. Co., 83 Id. 405.

S. K. DOW, for appellee, cited: Wrought Iron Bridge Co. *v.* Commissioners, 101 Ill. 518; Yore *v.* McCord, 74 Ill. 33; 1 Redfield on Wills, 123, 124.

Scholfield, J.—The several alleged errors in the rulings below will be passed upon in the order of their discussion in the argument on behalf of appellant.

First—The point is made that it is alleged in the declaration that it became the duty of the defendant, upon the plaintiff's

request, to slacken speed, so as to enable her, in the exercise of due care, to alight from the car without injury ; that it neglected to do so, but on the contrary, on the request of the plaintiff, the defendant caused its car to be stopped, and the plaintiff, with the defendant's consent and permission, attempted to alight from the car, and while so attempting the defendant carelessly, etc., caused the car to be suddenly and violently started, etc., whereby, etc.—whereas there is no evidence in the record tending to prove that the plaintiff requested the defendant to stop for her to alight, or that it did so, or that she obtained the defendant's consent or permission to alight when she attempted to do so, or that the defendant or its servants knew she was attempting to alight when she undertook to do so, and that therefore the Circuit Court should have given, as asked, the defendant's fourth instruction, namely, that “upon the evidence in this case the plaintiff cannot recover.”

A party is not bound to prove matters which are merely surplusage. If the proof does not correspond with such matters, the variance is immaterial. *Pennsylvania Co. v. Conlan*, 101 Ill. 93. If the whole of an averment may be stricken out without destroying the plaintiff's right of action, it is not necessary to prove it. *Williamson v. Allinson*, 2 East, 446 ; *Maxwell v. Maxwell*, 31 Me. 184. The gist of the present action is the negligence of the defendant in starting the car while the plaintiff was in the act of alighting. It was of no consequence whether the car was stopped at the instance of the plaintiff or not, since the act of stopping was productive of no injury, and is in no respect complained of. It is sufficient while the car was stopped parties were getting off, and the plaintiff, while attempting also to do so, with due care, was injured by reason of the negligent starting of the car by the defendant's servant. Nor could it be material to determine whether plaintiff asked or obtained permission of the defendant or its servants to alight. The car being stopped, from whatever cause, at a place where passengers were in the habit of alighting, she had the undoubted right to alight without making any request or obtaining any permission in that regard, and if the defendant's servants knew, or by the exercise of due care would have known of it, it was negligence on their part to start the car before she had a reasonable time in which to alight. So it would seem clear,

if the allegation that counsel insists there is no evidence tending to prove, were stricken from the declaration, it would still be substantially good. Where there is evidence tending to prove a cause of action, it is an invasion of the province of the jury to instruct them that the plaintiff cannot recover. *Guerdon v. Corbett*, 87 Ill. 272; *Hubner v. Feige*, 90 Ill. 208; *Peoria Ins. Co. v. Frost*, 37 Ill. 333.

There was some evidence tending to prove that the plaintiff was injured while attempting to alight with due care, by reason of the negligence of the defendant's servant in starting the car. It follows, in our opinion, there was no error in refusing to give the instruction.

Second—The first instruction, given at the instance of the plaintiff, is as follows:

"The court instructs the jury, as matter of law applicable to this case, that it was the duty of the defendant, as a common carrier of persons at Chicago for hire, when it stopped its cars, whether in consequence of a signal from some passenger on the car or not, not to start the same again while its passengers are in the act of getting off the car, if the fact that its passengers are in the act of alighting is known to the person having charge of the same, or would be known to such person by the exercise of due care and caution in the discharge of his duties, and as a common carrier of passengers defendant should give its passengers a reasonable opportunity to alight from its cars before starting the same, when the fact that its passengers desire to alight is known, or by the exercise of due care and diligence would be known to the person in charge of the car; and if the jury believe from the evidence and the circumstances proven in this case, that on the 13th day of May, A. D. 1875, the plaintiff was a passenger upon one of the street cars of the defendant operated by it on Madison and State streets, within the city of Chicago, and that while such car of defendant, in which plaintiff and others were being conveyed as passengers, was driven along State street, north of Randolph street, it was stopped for the purpose of allowing its passengers, among which was the plaintiff, to get off, or had stopped for any other purpose, with or without a signal to stop, and when so stopped the passengers were in the act of getting off said car, with the knowledge of the driver of said car; and if you further

find, from the evidence, that the plaintiff, at this time and place, the said car being stopped and not in motion (if you find, from the evidence, that such was the fact), in the exercise of due care and diligence on her part, was also in the act of alighting from said car, and that the defendant, by its driver, started the said car while plaintiff was so getting off, and before she had a reasonable time to do so, and thereby threw the plaintiff down upon the street, and by reason thereof the neck of her thigh-bone was broken or injured, without negligence or fault on her part, and by reason of negligence or carelessness on the part of the driver of the car (if you find, from the evidence, he was guilty of carelessness or negligence in starting the car), then the defendant would be liable for the damages thereby sustained by plaintiff, and the verdict should be for the plaintiff, unless the jury further find, from the evidence, that the release read in evidence was executed by plaintiff under an agreement which she was, at the time of making it, capable of understanding and intelligently consenting to, or that, after being fully informed thereof, she ratified it or failed to return the consideration paid to her (if the jury believe, from the evidence, any was paid to her), and thereby avoid said release."

Three objections are taken by counsel to this instruction:

1. It is insisted the evidence does not show that the defendant was in any manner negligent, and that, therefore, there was nothing in the evidence upon which to rest the instruction. It may be that if the question of the preponderance of the evidence upon the question of negligence were submitted to us as an original question, we would be of opinion that the decided preponderance is with the defendant. Still, that could not be of the slightest moment in respect of the duty now incumbent upon us. The question is, simply, did the evidence tend to establish the point submitted? If it did, then it was properly left to the jury. We have already said that, in our opinion, there was evidence tending to establish negligence in the servants of the defendant, and that was sufficient. The question was, then, proper to be submitted to the jury.

2. It is again insisted that the plaintiff, by her conduct, plainly told the driver of the car that she intended, after coming down on the car and not alighting at the end of the route, to make the

return trip on the same car, and that hence so much of the instruction as declared the duty of the defendant to be not to start the cars while its passengers are in the act of getting off, was erroneous, because inapplicable. It cannot with accuracy be said all the evidence shows, and none tends to the contrary, as here insisted by counsel for the defendant.

Mrs. Camp testified, among other things: "People were getting off the cars, and we (*i. e.*, plaintiff and witness) finally concluded we also would get off. I got off. I noticed she arose and followed immediately." Again she said: "One reason why we thought we would get off was because others were getting off. Others arose a little before, and we arose as others. . . . They were in the act of rising and getting out as we did. My recollection is there were several that seemed to be rising and leaving the car. The car was standing still, and others were getting off." Plaintiff, among other things, testified: "Mrs. Camp got off. Others got off, and I attempted to get off. The car started while one of my feet was on the side platform of the summer car and the other foot was stepping down, and threw me down. The car must have been started suddenly. I felt a jerk, and seemed to feel a whirl, and fell. . . . When we were getting off the car was standing still. Had not been standing still many minutes. People were getting off. We commenced to get off as soon as it stopped. There were other ladies. They got off the same side as we did. I saw Mrs. Camp get off. The car stopped to let passengers off, as I took it. I do not think I rang the bell—could not tell who did ring the bell. It is my impression that it was rung. Am certain this car was standing still. Did not attempt to get off while the car was moving. It was an open summer car, and he (the driver) could have seen me. There was no obstruction to prevent him knowing whether the passengers were getting off." The driver of the car testified, on cross-examination: "The accident occurred on State street, between fifty and one hundred feet from Randolph street. The car was an open summer car. The fact that I saw the lady fall from the side of the car refreshes my recollection. . . . There were no obstructions to prevent my seeing this lady as she was stepping down from the car. I could see her distinctly, and she could see me. . . . There are lots of passengers that ride either way on this part of State street, north

of Randolph. There was no provision against it. . . . Anybody could get on or off between Randolph and Lake streets, if they chose. There was no provision against it." If the driver of the car knew that passengers were getting off, as it would seem from this evidence he did, it was his duty not to start the car until they had sufficient time to get off. So, also, where a driver stops a car at a place where passengers are in the habit of getting off, he must not start it again until he knows he can do so in safety to his passengers. There is nothing in the evidence from which it is pretended the driver was authorized to infer plaintiff did not intend to get off, except the fact she rode to the end of the track, and did not get off. But it cannot be said that any legal inference results from this. People may get off when and where they please, provided the car is stopped when they attempt to do so. But even if the driver had been expressly notified by plaintiff that she did not intend to get off, when he saw passengers getting off it was still his duty to wait until they had reasonable time to leave the car before starting.

3. It is insisted that the instruction in respect of the release submits an improper test—that although she may not have been under any mental impairment, still, under this instruction, if she did not have sufficient intelligence she would not be bound by it. This instruction must be construed with reference to the facts in evidence before the jury, and being so construed, it must have been understood that the want of intelligence was caused by her being temporarily under the influence of opiates, etc.; and any pernicious effect that this instruction might possibly have otherwise had, was fully counteracted by the defendant's third instruction, supplementing and explaining all that is here omitted.

We think, on the whole, the instruction is free of legal objection.

Third—We are precluded, in cases like the present, from going into any controverted question of fact. The language of the amended Practice Act of June, 1877, is explicit, that "no assignment of error shall be allowed which shall call in question the determination of the inferior appellate court upon controverted questions of fact." Comment cannot make this more plain.

The judgment is affirmed.

THE HANNIBAL & ST. JOSEPH RAILROAD CO. V. MARTIN. (1)

Supreme Court, Illinois, September, 1884.

[Reported in 111 Ill. 219.]

RAILROAD COMPANY LIABLE FOR INJURY TO PASSENGER FALLING BETWEEN CARS OWNED AND OPERATED BY ANOTHER COMPANY.—Where it appeared that a passenger entered a railway train before it was entirely made up, by invitation of an employee, and there being no room in the car, was invited to a forward car by another employee, and while passing from one car to another, the forward car was drawn away, causing the passenger to fall to the ground and she sustained injuries, the railroad company was liable, and the fact that the car and engine and tracks were owned by another company, and the train was made up by the latter company's employees, did not relieve the railroad company whose passenger she was.

CARRIER LIABLE FOR INJURY TO PASSENGER BOARDING TRAIN BEFORE SAME IS FULLY MADE UP.—A carrier is under no obligation to receive passengers on its train before the train is fully made up, but if it does, it is bound to couple its cars and control its cars and engines in a careful, skillful and prudent manner, and for a neglect to do so will be liable for an injury resulting therefrom.

APPEAL from the Appellate Court for the First District. Heard in that court on appeal from the Circuit Court of Adams County. The facts appear in the opinion.

MARSH & MCFADON, for appellant, cited: *Garrison v. Chicago*, 97 Ill. 68; *R.R. Co. v. Benton*, 69 Ill. 174; *R.R. Co. v. Sykes*, 96 Ill. 171; *R'y Co. v. Krouse*, 30 Ohio St. 231; *R.R. Co. v. Randolph*, 53 Ill. 512; *Price v. R'y Co.*, 72 Mo. 418; *Dots v. R'y Co.*, 59 Id. 37; *Butterson v. R'y Co.*, 49 Mich. 187; *R.R. Co. v. Marcott*, 41 Id. 435; *Bloomington v. Goodrich*, 88 Ill. 558; 1 *Chitty's Pl. (7th Am. ed.)* 427; *Price v. R'y Co.*, 72 Mo. 416; *R'y Co. v. Rector*, 104 Ill. 305; *R'y Co. v. Eddy*, 72 Id. 140; *Hutch. on Carr.* § 809; *Joch v. Dankwardt*, 85 Ill. 332; *R.R. Co. v. Sutton*, 53 Id. 399; 2 *Greenl. on Ev.* § 267.

EWING & HAMILTON, for appellee, cited: *R.R. Co. v. Perry*, 58 Ga. 461; *R.R. Co. v. Martin*, 11 Bradw. 389; *R'y Co. v. Henks*, 91 Ill. 409; *R.R. Co. v. Sykes*, 96 Ill. 172; *R'y Co. v. Peyton*, 106 Ill. 534; *R.R. Co. v. Stables*, 62 Ill. 320.

1. Affirming same case in 11 Ill. App. 386, 2 Am. Neg. Cas. 491.

Scholfield, Ch. J.—Appellee and her husband having procured tickets entitling them to be carried from Quincy, in this State, to Kansas City, in Missouri, took seats in the waiting-room at the Quincy depot some minutes before the time fixed for the departure of appellant's train. She introduced evidence, upon the trial, to the effect that, after they had been seated thus for a brief time, the conductor of appellant's train entered the waiting-room and publicly announced that appellant's train for Kansas City was ready for departure; that thereupon appellee and her husband, and a number of other persons, arose and proceeded to the train, which was standing alongside the platform used by appellant, and entered the hindmost car in the train; that this car being full, they passed through it, and entered the next car forward, and that car also being full, they then passed through it and into the next forward car, which was also full; that there some man arose and gave appellee a seat, which she accepted, her husband meanwhile being compelled to remain standing; that about the time appellee took the seat thus given her, an employee of appellant entered the car and requested the passengers to be patient for a moment, promising that they would add another car to the train; that soon after this announcement there was the jar forward of one car striking against another, and a moment later an employee of appellant entered the car in which appellee was sitting, through its forward door, and notified the passengers that the car in front was ready; that thereupon some ten or twelve persons passed on and into the car in front, and appellee attempted to also do so, but just as she caught the rail of the forward car, and was in the act of stepping upon the platform of that car, it moved forward, leaving the car from which she was trying to pass stationary, and by reason thereof she fell or was precipitated to the ground. She was soon after taken up badly injured and in an insensible condition, and placed in the car in which she had been seated. She remained in the car, and in a brief time became conscious, and continued her journey notwithstanding her injuries. Appellant owns no track or depot in Quincy. Its cars cross the river and enter the depot of the Chicago, Burlington & Quincy Railroad Company on the tracks of that company, and its trains are made up in Quincy by employees of the Chicago, Burlington & Quincy Railroad Company.

The instructions given to the jury upon the trial, at the instance of appellee, are as follows :

"1. The court instructs the jury, that if they believe, from all the evidence in this case, that on or about the 16th day of February, 1880, the defendant was controlling and operating a train of cars on a railroad in this county, and that the defendant received the plaintiff on its cars as a passenger, for hire, then the court instructs the jury that the defendant was bound to make up its train, couple its cars, and manage and control its cars and engines in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such passenger.

"2. If the jury believe, from all the evidence in this case, that the plaintiff, on or about the 16th day of February, A. D. 1880, had purchased a ticket over the defendant's road from the city of Quincy, Illinois, to Kansas City, Missouri, and on or about that day became a passenger on the defendant's train of cars, to be carried from said Quincy to said Kansas City, then the law imposed upon the defendant the duty of using all necessary and reasonable skill, care and caution in making up and running said train, necessary for the reasonably safe conveyance of the plaintiff as such passenger. And if the jury further believe, from the evidence, that while the plaintiff was so a passenger on defendant's train of cars, she was requested by an employee or servant of the defendant to pass from the car in which she was, to the car immediately in front thereof, and that while she was in the act of passing from one car to the other in obedience to such request, by the carelessness and negligence of the defendant in making up its said train, and failing to sufficiently couple its said cars, or by the carelessness and negligence of the defendant in moving its engine and the cars attached thereto without sufficiently and securely coupling its cars, and without any fault or negligence on the part of the plaintiff, the engine and a part of the train of the defendant was started forward, and the car from which the plaintiff was passing was detached and separated from the car into which she was going, and the plaintiff was thereby, without any negligence or fault of her own, precipitated and thrown between said cars to the ground, and thereby injured, then the jury should find the defendant guilty, and assess the plaintiff's damages at such

sum, not exceeding \$10,000, as they may believe, from all the evidence, she has sustained.

"3. Although the jury may believe, from the evidence, that the defendant's train of cars, testified about by the witnesses in this case, was made up by the servants and employees of the Chicago, Burlington and Quincy Railroad Company, and that such servants and employees had the control and management of said cars until said train was made up and ready to start on its run over the defendant's road—still, if the jury further believe, from the evidence, that said servants and employees of the Chicago, Burlington and Quincy Railroad Company so made up and had control of said train and cars with the consent of the defendant, and under an agreement between the defendant and said Chicago, Burlington and Quincy Railroad Company, then the court instructs the jury, that for the said purpose of making up and managing said train and cars until said train was ready to start on its regular run, the said servants and employees of the Chicago, Burlington and Quincy Railroad Company so engaged were the servants and employees of the defendant.

"4. The court instructs the jury, that in this case it is immaterial whether the defendant actually owned the cars or the engine forming the train on which plaintiff was a passenger at the time of the supposed injury testified about, or not; but if the jury believe, from all the evidence in this case, that the plaintiff had purchased a ticket for her conveyance as a passenger over the railroad of the defendant, and had been received by the defendant in a car run and operated by said defendant, for the purpose of carrying her as a passenger, and that while so a passenger on a car run and operated by the defendant, by the carelessness and negligence of the defendant, and without any fault or negligence on her part, the plaintiff was injured in manner and form as alleged in the declaration in this case or some count thereof, then the jury should find the defendant guilty, and assess the plaintiff's damages at such amount as, from all the facts and circumstances in evidence, they believe she has sustained, not exceeding \$10,000.

"5. In determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to and they should take into consideration all the facts and circumstances

in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by witnesses in this case, her suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in this case, she has sustained or will sustain by reason of such injuries."

Numerous objections are urged against these instructions, and such as we deem important will be noticed in the order in which they are urged in appellant's argument.

It is contended the first instruction, and the first part of the second instruction, are bad, because in each a disputed fact in the case is assumed, namely, that at the time plaintiff was injured the train on which she was injured was already made up. We cannot concur in this view. The question whether appellee was received by appellant as a passenger on its train is left to the jury for their determination, as a question of fact, from the evidence. If they shall find that she was thus received, they are told what then was the duty of appellant in regard to making up its train. All that is assumed is, that a passenger may be received by the carrier on its train before the train is completely made up, and of the correctness of this there can be no question. A carrier is under no obligation to do so, but it may if it will; and when it does so, the duties declared in the instructions legally follow. Instances are quite common where, as appellee claims was the fact here, after a train is supposed to be fully made up the number of passengers is discovered to be too great for the number of cars in the train, and it becomes necessary to add other cars; and in such cases, and in all cases where, by the consent of those in charge of the train, passengers are admitted to seats in the cars with a view to transportation, before the train is made up, the railroad company owes to the passengers the duty in making up its train here pointed out.

Again, it is contended that both these instructions are bad, because not limited to what happened on the 16th day of February, 1880. We cannot conceive how this can be important, since it is not claimed on any side that appellee was injured oftener than once, or had more than one cause of action on the ground of negligence against appellant. The exact date in such cases can never be important save to prevent a misunderstanding as to the

transaction actually involved in the suit. Appellant claims but one transaction, and that is detailed, as seen, by witnesses on each side. Whether its actual date was the 16th of February, or on any other day in that year, is not perceived to be of any importance.

Appellant also contends that the second instruction is obnoxious to these further objections: First, it presupposes, near its close, that appellee was precipitated and thrown to the ground, which, it is insisted, is not sustained by the evidence; second, it ignores the question whether an ordinarily prudent person would have passed from one car to the other, in obedience to the request of the servant of appellant mentioned in the instruction, at the time when and under the circumstances under which appellee attempted to do so; third, it ignores the question whether an ordinarily prudent person would, under the facts of the case, have gotten upon the train at all, and would have been where appellee was at the time of receiving her injury; fourth, it tells the jury that if appellee was injured, either by the carelessness and negligence of appellant in making up its trains and failing to sufficiently couple its cars, or by the carelessness and negligence of appellant in moving its engine and the cars attached thereto, appellee ought to recover, whereas these things are charged in the declaration, conjunctively; fifth, there was no evidence that the engine and part of the train of appellant were started forward by reason of the carelessness of appellant in coupling its cars. We deem each of these objections untenable.

First—Whether the evidence sustains the allegation that appellee was precipitated and thrown to the ground was for the Appellate Court to determine. There was evidence tending to prove the allegation, and we cannot inquire into the weight of it. Indeed, if the testimony given by appellee and her husband is believed, the proof was ample. They say, when she was in the act of passing from one car to the other she reached forward and caught the railing of the forward car, and before she could step onto its platform it moved away from the car on the platform of which she was standing, and thus necessarily pulled her out of balance, and thereby precipitated her to the ground.

Second—The instruction expressly provides that it shall appear that appellee acted “without any fault or negligence” on her

part. If an ordinarily prudent person would not have passed from one car to the other, in obedience to the request of the servant, under the circumstances, it is impossible that appellee could have done so without any fault or negligence on her part. The principle contended for under this objection is practically and sufficiently expressed in the instruction.

Third—This objection is but a repetition, in a little different form, of the second objection, and the answer to that is likewise an answer to this. Ordinarily, where an employee upon a train makes public announcement of any matter affecting the safety and convenience of the passengers in being carried upon the train—as, for instance, where a car is overcrowded, that another coach has been added and is in readiness for their reception or the reception of such as choose to enter it—and no one connected with the train contradicts such announcement, passengers are authorized to assume and act upon its truth. And so here, as claimed by appellee, if they were notified, first, that a car would be added, and after hearing the noise and feeling the motion caused by one car bumping against another, they were informed that such car had been added, they were justified in assuming that to be a fact. Undoubtedly, if, when the car door was opened, they had perceived no car was there, or, if near, that it was too far from the car on which they were to be reached by a step, they must have acted upon the knowledge of what they thus saw, and not, then, upon the false declaration of the employee; but seeing the car in proper place on the train, they would have the right to assume that it was for the purpose declared by the employee, and that it was safe to attempt to pass into it. They could not be expected to know that it was not properly coupled.

Fourth—Under the first and fourth counts the liability charged upon appellant is because of its failing to make up its train and to sufficiently couple its cars, and the liability charged in the second and third counts is because of appellant's moving its engine and cars attached thereto without sufficiently and securely coupling its cars; hence, if, as the instruction told the jury, appellee was injured either by the carelessness and negligence of appellant in making up its train and failing to sufficiently couple its cars, she was entitled to recover, and this under the first and fourth counts; or, if she was injured by the carelessness and neg-

ligence of appellant in moving its engine and the cars attached thereto without sufficiently and securely coupling its cars, she was also entitled to recover, and this under the second and third counts. The alternative indicates simply the distinct grounds of action relied upon in the different sets of counts. Proof of either was sufficient.

Fifth—The instruction does not submit the question to the jury whether the engine and part of train on which appellee was were started forward by reason of the carelessness of appellant in coupling its cars. The question submitted is whether appellant, while appellee, in obedience to the request of an employee of appellant and without any fault or negligence on her part, was passing from one car to another, by carelessness and negligence in moving its engine, with the cars attached thereto, when they were not sufficiently and securely coupled, precipitated and threw her to the ground. This is not the precise phraseology, but it is the clear meaning of that used, and the evidence tends to prove that appellee was thus injured. It needs no demonstration that if appellant invited passengers into a coach—or what, in effect, is the same thing, notified them it was ready for the reception of passengers—and they thereupon proceeded to enter the coach, but before they had time to do so the engine was started forward, and the cars parted because they were not properly coupled, and one was injured thereby, appellant was guilty of such negligence as renders it responsible for the injury thus done.

The instruction is not entirely free from objection, but we are of opinion that it could not have misled the jury, and that appellant was not materially prejudiced by it.

The third instruction is objected to because it does not state the law upon the hypothesis that the evidence shows that appellee left the waiting room and got upon the train before it had been placed in position to receive passengers, etc. It is enough to say the third instruction does not assume to express what is the law on that hypothesis. It correctly expresses the law upon the hypothesis it assumes, and the court, at the instance of appellant, in other instructions expressed the law upon that hypothesis.

Objection is urged against the fifth instruction, on the grounds that it informs the jury that mental suffering was a proper element

of damages; that it practically assumes that appellee is entitled to recover damages, and that it tells the jury they should take into consideration the various elements of damages therein mentioned, etc. The objection, in our opinion, is not well taken on either ground. Where suffering in body and mind is the result of injuries caused by negligence, it is proper to take them into consideration in estimating the amount of damages. *Ind. & St. Louis R.R. Co. v. Stables*, 62 Ill. 320. The instruction does not assume that appellee is entitled to recover damages, but leaves that question to be determined by the jury, and the elements pointed out are those proper for the consideration of the jury. The discretion of the jury in exercising an intelligent judgment is not, as counsel seem to suppose, interfered with.

Four objections are urged against the fourth instruction: First, because it assumes that appellee was a passenger upon a train of appellant at the time she received her injuries; second, because there was no evidence that at the time appellee received her injuries, the car she was in was run and operated by appellant; third, because it does not exclude from the jury the idea that appellee could not recover for any aggravation of her injuries, or any injuries produced by her own neglect in procuring proper treatment; and fourth, the court should not have submitted the question of appellee's right to recover, under the third and fourth counts of the declaration to the jury, as is done by this instruction, because there is no evidence that the accident happened in the manner therein stated. These objections are all susceptible of satisfactory answers.

First—The instruction is not directed to the question whether appellee was a passenger on the train of appellant at the time she received her injuries, but to the question of the ownership of the cars and engine composing the train on which she was at that time, and correctly lays down the law that it is sufficient if appellee had purchased a ticket for her conveyance as a passenger over the railroad of appellant, and had been received by appellant in a car run and operated by it, for the purpose of carrying her as a passenger, etc. The question whether appellee was a passenger is fully and fairly presented by instructions given at the instance of appellee, and there is nothing in this repugnant to those. It is here fairly left to the jury to determine, from the evidence, whether

the contemplated hypothesis upon which appellant is to be held liable exists.

Second—The evidence shows that the train was made up by employees of the Chicago, Burlington and Quincy Railroad Company, and on its tracks, but for the appellant; and although a portion of the cars in the train came from the Chicago, Burlington and Quincy Company, and the balance came from the Wabash, St. Louis and Pacific Railway Company, when united they constituted appellant's train; and the use of the cars and tracks, and the labor in making up the train, were all to enable appellant to exercise its functions and perform its duties as a common carrier, and, therefore, the cars and tracks, and the servants employed in making up the train, so far as the rights of appellee are concerned, are to be regarded as the cars, tracks and servants of appellant. *Wabash, St. Louis & Pacific R'y Co. v. Peyton*, 106 Ill. 534.

Third—It was unnecessary that this instruction should exclude from the jury the idea that appellee could not recover for any aggravation of her injuries, etc., produced by her own neglect. That idea is not included in the instruction, and there is nothing in it repugnant to the principle contended for by appellant. Under appellee's theory of the case, her injuries were not thus augmented. If appellant desired an instruction upon the hypothesis that the evidence showed appellee's injuries were aggravated by her own neglect, it was entitled to, as it did, have the court, at its instance, to specially instruct the jury to that effect. *Peoria & Pekin Union R'y Co. v. Clayberg*, 107 Ill. 644.

Fourth—In our opinion, there was evidence tending to prove each count of the declaration. With its weight this court has nothing to do. Apart from this, however, the instruction is general, and if its principles are applicable to the declaration generally, it is sufficient. It was the privilege of appellant to call the attention of the jury to the defendant's allegations of the several counts, if it chose to do so, but it is sufficient if the law, as laid down at the instance of appellee, is correct and applicable to the case under either count.

Appellant contends that the court erred in modifying its tenth instruction as asked. As asked, it reads thus:

"Even if the jury believe from the evidence that the plaintiff in this case was injured on a passenger train of the Hannibal and

St. Joseph Railroad Company on the 16th day of February, 1880, yet if the jury further believe from the evidence that the said company, at said time, had a platform in the depot of the Chicago, Burlington and Quincy Railroad Company, designated by it for the reception of its passengers, and that said plaintiff was injured while said train was being made up and before said train had been placed in position for the reception of its passengers at said platform, the court instructs the jury that the relation of carrier and passenger did not subsist at the time of the occurrence of said injury between the plaintiff and the defendant, and the verdict of the jury should be for the defendant."

The court modified it by adding: "Unless the jury further believe from the evidence that some agent or servant of the defendant had notified plaintiff that said train was ready for the reception of passengers, and that in pursuance of such notice said plaintiff had got on said train of cars before she received the alleged injury, if the jury believe from the evidence she received any injury."

The objection taken to this modification is, that the fact that some agent or servant of appellant notified appellee that the train was ready would not have justified her in rushing upon a train not ready for passengers. We concur with appellant in the view that if appellee saw a danger before her she would not be justified in rushing upon it merely because appellant's agent or servant invited her to do so; but if appellant's servant or agent, as contemplated in this modification, told her that a train was ready for the reception of passengers, and she thereupon entered the train, she became a passenger. She was there by appellant's invitation, and was under the control by the consent of both. There is no pretense that she incurred any danger in getting on the train—*i. e.*, in becoming a passenger. Her injury was received afterwards, and in passing from one car to another for more ample accommodations.

Many of the questions discussed in the printed arguments before us relate to the effect and weight of the evidence, and are consequently finally settled by the judgment of the Appellate Court.

We are unable to perceive any such substantial error in the record as would justify a reversal of the judgment below, and it will, therefore, be affirmed.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO. v. WEST. (1)

Supreme Court, Illinois, June, 1888.

[Reported in 125 Ill. 320.]

RAILWAY COMPANY LIABLE FOR INJURY TO BOY JUMPING FROM ENGINE BY DIRECTION OF ENGINEER.—Where it appeared that a boy, seven years of age, was invited to ride on an engine by the engine-driver, who, upon the approach of the yardmaster, told the boy to jump off while the engine was in motion, and the boy obeyed and was injured, the railroad company was liable.

ENGINEER ACTING WITHOUT SCOPE OF EMPLOYMENT.—Where the rules of a railway company prohibit persons riding on an engine, an engineer who invites a person to ride thereon acts without the scope of his employment.

ENGINEER ACTING WITHIN SCOPE OF EMPLOYMENT.—And if a person is riding on an engine, whether by invitation of the engineer or not, it is within the scope of the engineer's employment to put the person off, and if in the discharge of the duty imposed the engineer negligently or wantonly injures such person the company is liable.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook County. Facts are stated in the opinion.

E. WALKER, for appellant, cited: *Patterson*, R'y Acc. L. § 105; *Mitchell v. Crassweller*, 13 C. B. 137; 76 E. C. L. 2; *Wood on R'y Law*, 1213, 1224; *Story on Bail*. § 402; *Ramsden v. R.R. Co.*, 104 Mass. 120; *Watton v. N. Y. C. S. C. Co.*, 139 Mass. 558; *Howe v. Newmarch*, 12 Allen, 57; *Snyder v. R.R. Co.*, 60 Mo. 413; *Sherman v. R.R. Co.*, 72 Mo. 62; *Mott v. Ice Co.*, 73 N. Y. 547; *Duff v. R.R. Co.*, 91 Pa. St. 458; *Flower v. R.R. Co.*, 69 Pa. St. 210; *Coal Co. v. Heeman*, 86 Pa. St. 418; *Halty v. Markel*, 44 Ill. 225; *R.R. Co. v. Downey*, 18 Ill. 259; *R.R. Co. v. Flexman*, 103 Ill. 546; *R'y Co. v. McMahon*, 103 Ill. 486.

SELDEN FISH, for appellee, cited: *R.R. Co. v. Flexman*, 103 Ill. 546; *R'y v. McMahon*, 103 Ill. 486; *R.R. Co. v. Hack*, 66 Ill. 241.

1. Cited in *C. R. I. & P. R'y Co. v. Koehler*, 47 Ill. App. 147, 2 Am. Neg. Cas. 523; *N. C. City R'y Co. v. Gastka*, 128 Ill. 617. Affirming same case, 24 Ill. App. 44, 2 Am. Neg. Cas. 496.

Scott, J.—This appeal is from a judgment of affirmance by the Appellate Court for the First District of a judgment rendered by the trial court in favor of Walter West, who sues by his next friend, Elizabeth West, against the Chicago, Milwaukee and St. Paul R'y Co. The action was to recover for personal injuries to the beneficial plaintiff, occasioned by the improper conduct of defendant's servants in putting him off an engine, on which it is alleged plaintiff had been riding by the invitation of the engineer. Of course, evidence in relation to controverted questions of fact cannot be discussed, and the argument addressed to this court on that branch of the case will not be considered.

Among the controverted questions of fact made before the jury, were, first, as to how plaintiff got on the engine—whether by the invitation of the engine-driver, or otherwise; and second, whether he was on the engine at all. It is insisted, on behalf of plaintiff, that he got upon the engine by the invitation of the engine-driver, and that he was injured by the negligent conduct of the engineer in putting him off without first stopping the engine; and on the part of defendant it is claimed plaintiff was not on the engine at all, but that he was injured in attempting to get on a flat car while the train was in motion, without any knowledge on the part of the trainmen that he was trying to do so. There is testimony tending to sustain both positions. The jury, by their verdict, sustained plaintiff's theory of the case, and as there is testimony tending to support the verdict, since that finding has been affirmed by the Appellate Court, the finding of the latter court is conclusive on this court. It will, therefore, be assumed, in the consideration of the questions of law discussed, that plaintiff was on the engine by invitation of the engine-driver, and that the injuries sustained by him were caused by the negligent manner in which plaintiff was put off the engine while in motion. It is not necessary for this court to express an opinion whether it would have found the same way, from the evidence, the trial and appellate courts did. The statute provides, this court shall not reconsider controverted questions of fact. That is the appropriate work of the courts through which the cause has come to this court. It has now passed that stage where controverted questions of fact can be reviewed.

Undoubtedly the law is as counsel states it to be, that where

the relation of master and servant exists between the railway company and the person whose act is the cause of injury to another person, the company is not liable if the servant, in causing the injury, is not acting within the scope of his employment; but, on the other hand, the law is equally well settled that the master is responsible where the servant acts within the general scope of his employment, for acts done while engaged in his master's business, with a view to the furtherance of that business, by which injury is caused to another, whether negligently or wantonly committed. Applying these general principles of law, the case in hand will be found to present no serious difficulty. Conceding, as must be done, the engineer invited plaintiff to ride with him on his engine, he was acting without the scope of any duty he owed to his employer, and had any injury come to plaintiff on account of that act of the engineer itself, whether negligently done or not, the master would not be liable. If that were all there is of this case, it is plain the judgment would be contrary to law, and should be set aside. The action is not based on any such ground. It is sought to recover for a very different reason. It is because when plaintiff was on the engine, no matter how he got there, it was the duty of the engineer to put him off, and in doing so he was obliged to observe reasonable care. The rules of the company, in evidence, show it was unlawful for anyone, other than certain employees, to ride upon the engine. Should any stranger get upon the engine, it would clearly be the duty of the engineer to put him off, and in doing so he would be acting within the general scope of his employment, and if, in the discharge of that duty, he negligently or wantonly injured such person, the master would be liable. In this case it may be conceded plaintiff was wrongfully on the engine, whether he was there by the invitation of the engineer or by his own wrongful conduct, and it was the duty of the engineer to cause him to get off. At the time of the accident plaintiff was about seven years old, of course, was too young to observe much, if any, care for his personal safety. It was the duty of the engineer to observe care, even if plaintiff was in the wrong in getting upon the engine. It was admitted by counsel at the trial, "the engineer has no right to throw a boy off or to kick him off." That concession is in harmony with the law that makes it his duty to observe reason-

able care, under the circumstances, in putting a person off the engine, even when wrongfully there. The evidence tends to show, and it must be assumed such is the fact, that when the engine-driver saw the yardmaster, he said to plaintiff, "Cheese it, the old man is coming," and then told plaintiff to get off. The engine was then in motion, and the boy undertook to get off, as he was told to do, and in doing so was injured, as is alleged in the declaration. Conceding these to be the facts, it was negligent conduct in the engineer to direct a child only seven years old to get off the engine while in motion. It may be the engine-driver was guiltless of improper or negligent conduct in the matter; but the lower courts have found otherwise, and this court is prohibited from reviewing that finding, and it must consider the case as it comes before it.

The instructions given for plaintiff are not so variant from views here expressed as to make the giving of them any serious ground of error. The second and fourth requests of defendant, which the court refused to give, do not contain accurate expressions of the law applicable to the facts of the case, and the court very properly refused to give them. Other instructions asked were properly refused for the same reason. The doctrine applicable to "co-employees in the same line of employment," as stated in the seventh refused instruction, could have no appropriate application to the facts of the case, and was properly refused.

The judgment of the Appellate Court will be affirmed.

MCNULTA v. ENSCH. (1)

Supreme Court, Illinois, March, 1890.

[Reported in 134 Ill. 46.]

TRAIN STOPPING AT OTHER THAN SCHEDULED STOPPING PLACE—PASSENGER INJURED WHILE ALIGHTING—RAILROAD COMPANY LIABLE.—Where it appeared that a station was

1. Reversing same case, 31 Ill. App. 100, 2 Am. Neg. Cas. 503, only on the ground of error in entry of judgment as being entered against McNulta *personally*, instead of as *receiver*. The judgment in the Appel-

late Court, therefore, is practically affirmed.

Cited in *C. & A. R. Co. v. Arnol*, 144 Ill. 261, 2 Am. Neg. Cas. 694; *C. & A. R. Co. v. Byrum*, 153 Ill. 131, 2 Am. Neg. Cas. 719.

announced by an employee of a railroad company and soon after the train stopped there, although not a scheduled stopping place for that train, and a passenger in attempting to alight was thrown down and injured by the train starting with a violent jerk, it having stopped only a moment, the company was liable and could not avoid liability by showing that the train stopped a few rods further on and then ample time was given for the passengers to get off.

RECEIVER OF RAILROAD COMPANY NOT CHARGEABLE WITH PERSONAL LIABILITY.—A judgment against a receiver creates no personal liability and it is to be so entered as to be enforced only out of the funds of the corporation properly chargeable to him in the capacity of receiver.

WRIT of error to the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Sangamon County.

Action on the case brought by John Ensich against John McNulta, receiver of the Wabash, St. Louis and Pacific Railway Company, in the Sangamon Circuit Court, to recover for personal injuries. The first count of the declaration charged the defendant was operating the railroad as receiver; that he was a common carrier; that he received the plaintiff as a passenger, to be carried from Springfield to Starne's Station, and that the platform there was constructed of unsuitable and defective material, and was in bad order and condition, etc. The second count charges that it was the duty of the defendant to stop such train at Starne's Station a sufficient length of time to enable plaintiff to get off the train in safety, and have the platform lighted, and that the defendant negligently failed to stop said train upon which the plaintiff was a passenger, etc., a sufficient length of time for that purpose, and negligently failed to cause a light to be placed upon the platform, by means whereof, the plaintiff being in the act of getting off the train after it had stopped, and in the nighttime, and while in the exercise of due care, etc., the train was suddenly started, and he was thrown between the platform of the station and one of the cars, and was caught by said car and carried beyond the platform, whereby he was injured, etc. The defendant pleaded the general issue only.

Upon the trial, plaintiff recovered judgment for \$2,500. The court overruled a motion for a new trial, and rendered judgment on the verdict, and for costs. The defendant sued out of the

Appellate Court for the Third District a writ of error, and assigned upon the record, for error, the following: First, that the verdict of the jury was contrary to the evidence; second, that the verdict was contrary to law and the instructions of the court; third, that the court gave improper instructions at the instance of the plaintiff, there being no evidence on which to base said instructions; fourth, that the court erred in overruling defendant's motion for a new trial, and in rendering judgment against the receiver, personally. The Appellate Court affirmed the judgment of the Circuit Court, and the defendant brings the case to this court by writ of error, and assigns for error that the Appellate Court erred in not reversing the judgment, and in affirming the same.

The only evidence offered by the plaintiff related to the alleged failure of the defendant to stop the train at Starne's Station a sufficient length of time to enable the plaintiff to get off the same in safety. The evidence as to whether the plaintiff paid his fare, and that it was received by the conductor, and as to whether the train stopped at all at the platform at Starne's Station, was conflicting. There was, however, no dispute as to the fact that the train did stop after passing the platform some fifty or sixty yards. The plaintiff got on the train going east, at Springfield, January 14, 1888, a little after nine o'clock, P.M. The train was a through fast train, was not scheduled to stop at Starne's Station, and no tickets were sold for that point to be used on the train. There was also a conflict in the evidence as to whether the station was called immediately before reaching it, by the persons in charge of the train.

GEORGE B. BURNETT, for plaintiff in error.

C. A. KEYES, for defendant in error.

Shope, Ch. J.—The first point made by the plaintiff in error is, that the court erred in giving plaintiff's first instruction. The reason assigned is, there was no evidence upon which to base it. The instruction is as follows:

"The court instructs the jury, that if they believe, from the evidence, that the plaintiff was a passenger on the train of the defendant on the night of the 14th of January, in the year 1888, and that while the plaintiff was so a passenger, the said train stopped at the station which was the destination of plaintiff, but that said train did not stop at said station for a reasonably suffi-

cient length of time to allow the plaintiff to safely get off of said train at said station, and that said plaintiff was injured by reason of said train not stopping at said station for a reasonably sufficient length of time to allow said plaintiff to safely get off of said train, then, and in that case, a *prima facie* case of negligence is made out against the defendant, and the burden of explaining such *prima facie* case of negligence is thrown upon the defendant, provided the jury further believe, from the evidence, that the plaintiff, at the time he received the injury (if the jury believe, from the evidence, that the plaintiff did receive the injury), was acting with due care and caution."

There was evidence that the train made two stops before it reached the crossing of the Illinois Central Railroad: First, at or near the platform of Starne's Station, though but momentarily, and again started with a violent jerk; and then, some fifty or sixty yards further, and east of the platform, where ample time was given to passengers to get off. It was shown by the evidence that this train, which is called the "lightning express," was not scheduled or required to stop at Starne's Station, but it was required by law to stop within eight hundred feet of the crossing of the Illinois Central Railroad, which was shown to be five hundred and two feet east of the platform at Starne's Station. There was ample evidence, if the jury believed it, that this lightning express train, going east, sometimes stopped at the platform of Starne's Station, sometimes stopped before reaching it, and often east of the same, and that passengers were in the habit of getting on and off the train at the place where it stopped before reaching the intersection of the two roads. In this case there was evidence that the engineer whistled before reaching the platform at Starne's Station, and slacked the speed of the train until the coach in which the plaintiff was riding reached said platform, when the train came to a stop. It is true that there was a conflict in the evidence on this point. Those of the witnesses testifying to the stoppage of the train at the platform say it was a very short one—only a moment or a second—when the train started again with a sudden, violent jerk, so strong as to almost throw down those standing on their feet in the cars. The plaintiff testified, that knowing the train would stop there for a very short time only, and that there were a good many passengers to

get off there, he went to the rear end of the car next the smoking car, and sat down on the steps, so as to be able to get off before the rush of the other passengers came, and he, as well as others, testified that the train came to a full stop in front of the platform. He was to some extent corroborated also in this, from the fact that his jug, after the injury, was found sitting on the platform. He testified that he stepped one foot on the platform, and, before moving the other from the step of the car, the train started suddenly, and with such force as to throw him down, and that the next car struck him as he fell.

We agree with counsel for the plaintiff in error that this instruction must have referred to this first momentary stopping of the train, and not to its stopping east of the platform, as there was no evidence that the train did not then remain long enough to let all the passengers off. While it may be, and is true, that the train was not bound to stop at the platform to discharge its passengers bound for that station, it might stop at any place within eight hundred feet of the railroad intersection, as those in charge saw fit; and while it did not undertake to discharge passengers at the platform, it must be borne in mind that the plaintiff could not know what point those in charge of the train would select as the place for him to get off, except by their acts and conduct. As was said by the Appellate Court: "The conductor or brakeman announced the station in the usual manner, just before it was reached, and if, following that announcement, and in about the usual time afterwards, it actually stopped at the station platform, passengers would be justified in presuming it was for the purpose of discharging them there, and in proceeding to get off; and if in the act of getting off while it was so stopped, and with due promptness and care, the plaintiff was thrown off and injured by the starting up of the train, that presumption would be conclusive upon the defendant. He could not avoid liability for such injury by stopping the train again a few rods further on, and then giving ample time for discharging the passengers. The jury must have found it did so stop," etc.

We think there was sufficient evidence upon which to predicate the instruction. So far as the rights of the plaintiff were concerned, the place where the train first stopped—that is, the platform (if it be found that it did stop at the platform, as has neces-

sarily been done both by the trial and Appellate courts)—must be regarded as the place where the defendant undertook to discharge him, there being no announcement to the contrary. Taking the evidence for the plaintiff as true, the acts and conduct of those in charge of the train justified the plaintiff in acting upon the assumption and belief that the train was there stopped to enable him to alight therefrom.

The defendant asked this instruction, among others:

“ 5. The court instructs the jury, that the only issue for their determination, under the evidence before you, is that presented by the second count of the plaintiff's declaration, which avers that the train did not stop a sufficient length of time to permit the plaintiff to get off in safety; and the court instructs you, that the legal effect of this averment is that said train did not stop a sufficient length of time at the point where the defendant undertook the discharge of the passengers for that place, and to entitle the plaintiff to recover, this averment must be proved as alleged; and if the jury believe, from the evidence, that said train did stop at the place where the defendant undertook to discharge the passengers at that place, a sufficient length of time to permit plaintiff to get off in safety, then plaintiff cannot recover, and your verdict must be for the defendant, even though you may further believe, from the evidence, that before said train reached the place where the defendant undertook to discharge said passengers, it made a momentary halt, and that plaintiff, in attempting to get off during said momentary halt, was thrown from the train and injured.”

From what has preceded, it is apparent that this instruction contained an erroneous proposition. The second count of the declaration charges that it was the duty of the defendant to stop the train at Starne's Station long enough for the plaintiff to safely get off, and that he failed to do so, and that is the place where the plaintiff got off the train. He was not on the train when it stopped long enough for the passengers to get off. When the train stopped at the station, under the circumstances already stated, the plaintiff had the right to presume that the defendant proposed to discharge his passengers at that point, and to act upon that assumption, and the stop at the platform should have been long enough to allow the plaintiff to alight in safety. The

evidence tended to show that the ordinary signal was given for the station, and also, as found by the Appellate Court, the station was announced in the cars in the usual manner, by either the conductor or brakeman, and the defendant could not shield himself from liability to plaintiff, who started to get off immediately following such signal and announcement when the train came to a full stop at the platform, by showing that those in charge of the train intended to go further east before discharging the passengers, of which no notice was given. The stop at the platform, as to the plaintiff, under the peculiar facts of this case, might have been properly regarded by him as the stoppage of the train at the point where it was intended to let off the passengers. Having by the acts and conduct of his servants justified the plaintiff in attempting to get off the train, the duty of the defendant then attached to stop his train a sufficient length of time to enable the plaintiff to reach the platform in safety. His duty to the plaintiff, whom he had induced to believe that the train had reached the point at which he was to depart therefrom, was in respect of the place where the train first halted, and not in respect of the place where it finally stopped.

It is complained by the plaintiff in error that the jury must have disregarded this instruction, and it follows from what we have said, that if they did disregard it, no legal wrong was done the defendant. Although no tickets were sold at Springfield or Starne's Station, to be used on this train, the plaintiff and some twenty others were received upon this train to be carried to Starne's Station, and there was evidence tending to show that they paid, and the conductor received their fare. On collecting fare at Starne's Station, it became the duty of the defendant's servants to notify the passengers so paying that the train would not stop at that station, or to carry them to such station and then give them sufficient time to get off in safety. It may be that if the passengers knew that the train did not stop at the platform of the station, but at some convenient point near by, and before reaching the Illinois Central crossing, and took passage with that understanding, there would be no obligation to stop at the platform. The proofs tend to show that for several years before the accident the lightning express train received passengers at Springfield to be carried to Starne's Station, and it was well understood

that the conductor of the train was in the habit of collecting fares at that place.

The plaintiff in error also claims there was no evidence that he was operating the railroad at the time of the injury, or that the persons in charge of the train were his servants, or that he was a common carrier. Railway companies are by law common carriers of passengers and freight. *Toledo, Wabash & W. R'y Co. v. Roberts*, 71 Ill. 542; *Parmelee v. McNulty*, 19 Ill. 556. The proofs show that the Wabash, St. Louis and Pacific Railway was being operated in carrying passengers before and at the time of the plaintiff's injury. This objection was not made in the trial court. No plea was filed putting in issue the representative character in which the defendant was sued. In a suit against an administrator, unless he denies the representative capacity in which he is sued, it will be admitted. 3 Chitty's Pl. 940, note K. A judgment against the receiver creates no personal liability, and it is to be so entered as to be enforced only out of the funds of the corporation properly chargeable to him in the capacity of receiver. The fact, therefore, that the receiver made no objection to the suit against him in his representative capacity, before or at the trial, ought to preclude him from urging that he was not rightly sued. Plaintiff in error, in his brief, says: "The point is not that there is no evidence that defendant was receiver of the railway company, as the Appellate Court seems to suppose, but the point is, there was no proof that the defendant was operating the road at the time." If McNulta was the receiver of the road at the time of the injury, it must be presumed, in the absence of any plea or denial, that he was in discharge of the duty imposed upon him by that relation to the railroad. It will not be necessary for us to further discuss that question, for it was purely a question of fact. In no way has the plaintiff in error preserved the question in the record, so as to present it as a matter of law. The appellate and trial courts having found the facts adversely to plaintiff in error, it is not open for our consideration.

It is lastly objected that the judgment of the Circuit Court is erroneous in that it is a personal judgment against McNulta. It is as follows:

"John Ensich *v.* John McNulta, receiver of the Wabash, St. Louis and Pacific Railway Company.

"And now came the parties, by their respective attorneys, and the court, hearing the arguments of counsel upon the defendant's motion for a new trial and being fully advised, overrules and denies the same. It is, therefore, ordered and adjudged by the court that the plaintiff have and recover of and from the defendant the sum of \$2,500, the damages aforesaid, as well as its costs by him herein expended, and that execution issue therefor."

We are of opinion that the judgment is erroneous in the respect urged. No judgment could be rendered against McNulta individually, and no award of execution could be made. It must be entered against him as receiver, and be made payable out of the funds held by him in that capacity in the due course of the administration of his receivership. Beach on Receivers, 715, and authorities cited.

This error will necessitate the reversal of the judgment of the Circuit Court, but as no error had intervened up to and including the overruling of the defendant's motion for a new trial, no occasion exists for awarding a *venire facias de novo*. In *Alwood v. Mansfield*, 33 Ill. 452, the court found that the verdict of the jury was sustained by the evidence, but that an improper order had been entered thereon by the Circuit Court, and the proper entry of judgment was made in this court. See, also, *Pearsons v. Hamilton*, 1 Scam. 415. In the subsequent case of *Storing v. Onley*, 44 Ill. 123, the better practice is said to be to reverse the judgment and remand the cause, with instructions to the Circuit Court to enter the proper order. Without reference to other adjudications, the practice has been, in cases where the verdict of the jury was correct and no error has intervened for which it should be set aside and a new trial awarded, to reverse the judgment improperly rendered upon the verdict, and to enter the correct judgment in this court, or to remand the cause, with instructions to the trial court to enter the proper judgment. We find in this record no other error than that indicated, and we regard it the better practice to remand the cause, with instructions.

For the error in the entry of the judgment, the judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court, with instructions to enter judgment

upon the verdict of the jury in conformity with the foregoing ruling, together with the costs of that court.

Judgment reversed. (1)

THE NORTH CHICAGO STREET RAILROAD COMPANY v. WILLIAMS. (2)

Supreme Court, Illinois, January, 1892.

[Reported in 140 Ill. 275.]

NEGLIGENCE OF STREET CAR COMPANY IN PLACING TRACK NEAR CURB—QUESTION FOR THE JURY.—Where it appeared that the plaintiff in attempting to board a summer horse car while in motion was knocked off the step that ran alongside the car by reason of his coming in contact with a telegraph pole while endeavoring to get into a seat, it was a fair question to submit to the jury whether the company was or was not guilty of negligence in placing its track so near the pole.

PERSON VIOLATING RULE OF COMPANY IN BOARDING CAR NOT A TRESPASSER.—It cannot be said that a person after he gets on a horse car, even though no fare has been collected of him before he meets with an injury, is a trespasser simply because he has violated a rule of the company as to the mode of his getting on.

It is not negligence *per se* for a person to get on or off a street car drawn by horses while it is in motion.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Superior Court of Cook County. The facts appear in the opinion.

WILLIAM B. KEEP and EDMUND FURTHMANN, for the appellant, cited: R.R. Co. v. Randolph, 53 Ill. 510; R.R. Co. v. Mock, 88 Id. 87; R.R. Co. v. Scates, 90 Id. 586; R.R. Co. v. Chambers, 17 Id. 519; Hagan v. R.R. Co., 15 Phil. 278; R.R. Co. v. Dingman, 1 Bradw. 162; Turnpike Road v. Carson, 72 Md. 377; Dietrick v. R.R. Co., 58 Id. 347; Dietrick v. R.R. Co., 56 Id. 559; Sweeney v. R.R. Co., 10 Allen, 368; Beach on Contrib. Neg. § 12; R.R. Co. v. Whitacre, 35 Ohio St. 627; Weed v. Balston Spa, 76 N. Y. 329; Bruker v. Covington, 69 Ind. 33; 2 Rorer on Rail.

1. See first para. of note 1 to this case on p. 675, *ante*.

2. Cited in N. C. St. R'y Co. v. Wrixon, 51 Ill. App. 307, 2 Am. Neg. Cas. 528.

979; Hutch. on Carr. §§ 112, 562, 587, 588; 2 Wood on R'ys, 1035; Merrill *v.* R.R. Co., 139 Mass. 238; Gardner *v.* Northampton Co., 51 Conn., 143; Moss *v.* Johnson, 22 Ill. 633; R.R. Co. *v.* Mehlsack, 131 Id. 61; R'y Co. *v.* Beegs, 85 Id. 80.

STILES & LEWIS, for appellee, cited: R.R. Co. *v.* Russell, 91 Ill. 298; R.R. Co. *v.* Gregory, 58 Id. 272; Whalen *v.* R.R. Co., 16 Ill. App. 320; Dickinson *v.* R.R. Co., 53 Mich. 443; Schackert *v.* R'y Co., 42 Minn. 42; Briggs *v.* R'y Co., 148 Mass. 72; McDonough *v.* R.R. Co., 137 Id. 210; Butler *v.* R.R. Co., 49 Hun, 610; 121 N. Y. 112; Eppendorf *v.* R.R. Co., 69 Id. 195; Ganiard *v.* R.R. Co., 2 Id. 470; Rathbone *v.* R.R. Co. 13 R. I. 709; R'y Co. *v.* Green, 56 Md. 84; R'y Co. *v.* Mumford, 97 Ill. 560; 2 Thomp. on Neg. 1151; Wharton on Neg. §§ 302, 303, 323, 324; R'y Co. *v.* Boudron, 92 Pa. St. 475; R'y Co. *v.* Walling, 97 Id. 55; Messell *v.* R.R. Co., 8 Allen, 234; Maguire *v.* R.R. Co., 115 Mass. 239; Clark *v.* R.R. Co., 36 N. Y. 135; Ginna *v.* R.R. Co., 67 Id. 596; Nolan *v.* R.R. Co., 87 Id. 63; Hayes *v.* R.R. Co., 97 Id. 259; Hadenkamp *v.* R.R. Co., 1 Sweeney, 400; Hourney *v.* R.R. Co., 7 N. Y. 603; Huelsenkamp *v.* R'y Co., 37 Mo. 537; Burns *v.* R'y Co., 50 Id. 139; Hunt *v.* R.R. Co., 14 Mo. App. 160; R'y Co. *v.* Lee, 50 N. J. L. 435; R'y Co. *v.* Higgs, 38 Kan. 375; R.R. Co. *v.* Renz, 55 Ga. 126; Quinn *v.* R.R. Co., 51 Ill. 495; R.R. Co. *v.* Hoosey, 99 Pa. St. 492; Dewin *v.* R.R. Co., 148 Mass. 343; Clark *v.* R.R. Co., 36 N. Y. 135; Spooner *v.* R.R. Co., 54 N. Y. 230.

Magruder, Ch. J.—This is an action for damages for a personal injury, begun on November 23, 1888, in the Superior Court of Cook County by the appellee, Williams, against the appellant company. Plaintiff below recovered a judgment, which has been affirmed by the Appellate Court.

Appellant was operating a line of street railway cars, drawn by horses, in the city of Chicago. In May, 1888, it was reconstructing its tracks, so as to substitute the cable system for horse power. As it was necessary to tear up the street in order to insert the cable machinery, it removed the track in Lincoln avenue, north of its intersection with Garfield and Cleveland avenues, to the east side of the street, and near the curb of the east sidewalk. Upon the track thus laid for temporary use it was propelling its cars by horse power, when the accident occurred

was said by the Supreme Court of Pennsylvania in *Germantown Pass. R'y Co. v. Walling*, 97 Penn. St. 55: "An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam power might be prudent if done on a horse car." In the later case of *Chicago City R'y Co. v. Mumford*, 97 Ill. 560, the plaintiff was injured while alighting from a horse car which was in motion, and it was held that it was properly left to the jury to decide whether the injury was due to the negligence of the plaintiff, or of the driver of the car.

In the case at bar, while the proof shows that the car was in motion, it does not show that its motion was otherwise than very slow. Both Lloyd, the policeman, and the plaintiff, swear that they "stepped" upon the car. The act of "stepping" involves the idea of slow movement, and these parties could not have stepped upon the car if it had been going rapidly. There is nothing in the evidence, so far as we can discover, to justify the assumption, contained in defendant's refused instruction No. 9, that the plaintiff "jumped" upon the car. As the car was passing a point where three streets intersected each other, and where the street, on which the car was moving, was in a dangerous condition by reason of the excavations for the cable, and by reason of the piles of dirt and debris caused by such excavations, the motion of the car must necessarily have been slow.

It is also assigned as error, that the court refused to instruct the jury that the defendant was not guilty of any negligence. Where a railroad company places its tracks so near an obstruction, which it is necessary for its cars to pass, that its passengers, in getting on and off the cars and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury, whether the company is or is not guilty of negligence.

In *Ill. Cen. R.R. Co. v. Welch*, 52 Ill. 183, a brakeman, while in discharge of his duties upon a slowly moving train, was knocked off the car by an awning projecting from a station house of the company on the line of the road; the company was held to have been guilty of negligence, the dangerous proximity of the awning having been known to its division superintendent and other officers. There was the same holding in *C. B. & Q. R.R. Co. v. Gregory*, 58 Ill. 272, where the company's fireman, while in the discharge of his duty, was injured by a "mail-catcher," which

not in the exercise of due care was a matter for the determination of the jury, under all the circumstances of the case. *City of Chicago v. McLean*, 133 Ill. 148; *Penn. Co. v. Franam*, 112 Id. 398; *Myers v. I. & St. L. R Co.*, 113 Id. 386; *C. St. L. & P. R.R. Co. v. Hutchison*, 120 Id. 587.

In *Schacherl v. St. Paul City R'y Co.*, 42 Minn. 42, it is said: "It is well settled that it is not negligence *per se* for a person to get on or off a street car drawn by horses while it is in motion. It depends upon the circumstances surrounding each case, and the question is ordinarily one of fact to be submitted to a jury." In *McDonough v. Metropolitan R.R.*, 137 Mass. 210, it was contended that the attempt of the plaintiff to get upon the front platform of a horse car while it was in motion should be held to be "conclusive that he was not in the exercise of due care," but the Supreme Court of Massachusetts say in that case: "There is no rule of law that riding or stepping upon the front platform of a horse car when in motion is negligence. *Meesel v. L. & B. R.R.*, 8 Allen, 234, and other cases. Whether any particular act of that kind is negligent must depend upon the circumstances attending and characterizing it, and must ordinarily be determined by the judgment of a jury." In the later case of *Briggs v. Union Street R'y Co.*, 148 Mass. 72, the same court said: "Whether a person riding upon the front or rear platform of a horse car, or getting on or off at either platform while the car is in motion is in the exercise of due care, has repeatedly been decided to be a question of fact for a jury." The same doctrine has been held in New York. In *Eppendorff v. Brooklyn City & N. R.R. Co.*, 69 N. Y. 195, it is said: "It cannot be said, as matter of law, that it is always negligent for a person to get upon a street car while in motion." *Morrison v. Broadway & Seventh Ave. R.R. Co.*, 22 Legal News, 219.

We are referred to the case of *C. & N. W. R'y Co. v. Scates*, 90 Ill. 586, as holding a contrary doctrine. There, however, the party, who was injured by being brought in contact with a post upon the railroad platform, attempted to get upon one of the cars of a steam railway train after the train had started from the depot or station. A stricter rule than that which is applicable to horse cars must be held to apply to steam cars, whose movements are more rapid, and whose propelling power is more dangerous. As

was said by the Supreme Court of Pennsylvania in *Germanstown Pass. R'y Co. v. Walling*, 97 Penn. St. 55: "An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam power might be prudent if done on a horse car." In the later case of *Chicago City R'y Co. v. Mumford*, 97 Ill. 560, the plaintiff was injured while alighting from a horse car which was in motion, and it was held that it was properly left to the jury to decide whether the injury was due to the negligence of the plaintiff, or of the driver of the car.

In the case at bar, while the proof shows that the car was in motion, it does not show that its motion was otherwise than very slow. Both Lloyd, the policeman, and the plaintiff, swear that they "stepped" upon the car. The act of "stepping" involves the idea of slow movement, and these parties could not have stepped upon the car if it had been going rapidly. There is nothing in the evidence, so far as we can discover, to justify the assumption, contained in defendant's refused instruction No. 9, that the plaintiff "jumped" upon the car. As the car was passing a point where three streets intersected each other, and where the street, on which the car was moving, was in a dangerous condition by reason of the excavations for the cable, and by reason of the piles of dirt and debris caused by such excavations, the motion of the car must necessarily have been slow.

It is also assigned as error, that the court refused to instruct the jury that the defendant was not guilty of any negligence. Where a railroad company places its tracks so near an obstruction, which it is necessary for its cars to pass, that its passengers, in getting on and off the cars and while upon them, are in danger of being injured by contact with such obstruction, it is a fair question for the jury, whether the company is or is not guilty of negligence.

In *Ill. Cen. R.R. Co. v. Welch*, 52 Ill. 183, a brakeman, while in discharge of his duties upon a slowly moving train, was knocked off the car by an awning projecting from a station house of the company on the line of the road; the company was held to have been guilty of negligence, the dangerous proximity of the awning having been known to its division superintendent and other officers. There was the same holding in *C. B. & Q. R.R. Co. v. Gregory*, 58 Ill. 272, where the company's fireman, while in the discharge of his duty, was injured by a "mail-catcher," which

had been placed by the company near its tracks. Again, in *C. & I. R.R. Co. v. Russell*, Admr., 91 Ill. 298, a brakeman engaged in his duties, while descending from the top of a freight car in motion, and coming in collision with a telegraph pole so near the side track that freight cars passed within eighteen inches of it, was thrown from the car and killed; the company was held liable, although it did not place the pole where it was; it was there said that the company should not have suffered the obstruction to be in such dangerous proximity to the track, and that they were affected with knowledge of its position, because it had been there a sufficient length of time to give rise to a presumption of notice. *Dickinson v. Port Huron & N. W. R'y Co.*, 53 Mich. 43; *C. & A. R.R. Co. v. Pondrom*, 51 Ill. 333.

It may be true, as claimed by counsel, that the appellant was obliged to move its track to the east in order to make the contemplated improvement; but it was a question for the jury to determine whether too much space was left in the middle of the street for those putting in the cable and too little space for the passage of the cars on which the public traveled, or whether the contrary was the fact.

It is also assigned as error, that the court refused to give the eleventh and twelfth instructions asked by the defendant. These told the jury that, if when the plaintiff stepped upon the car, he knew the location of the track and its distance from the telegraph post he assumed the risk of any injury he might receive, and could not recover. There was proof tending to show that the track had only been moved to its temporary position about a week before the accident, and there was also proof tending to show that plaintiff was in the habit of traveling upon appellant's cars and of passing up and down Lincoln avenue, though mostly on the opposite side of the street from that on which the obstruction was located. It was for the jury to say, whether he had the knowledge in question, or ought to have had it under all the circumstances. But all that was material in the refused instructions was expressed in the instructions given for the plaintiff, which told the jury that, if the plaintiff knew the location of the track and its distance from the post, he was required to use more than ordinary care to avoid accident, and if he failed to do so, and thereby contributed to the injury, he could not recover; and that, if he knew of the con-

dition of things at the point in question, and, by the exercise of ordinary care, could have foreseen and provided against the accident, their verdict should be for the defendant. These instructions, whether in all respects accurate or not, were certainly favorable to the defendant; and, therefore, there was no error in refusing instructions Nos. 11 and 12.

Complaint is also made that the court refused the following instruction: "The jury are instructed, as a matter of law, applicable to this case, that, under the ordinance of the city . . . the . . . company has no right to stop its cars except on the further crossing of street intersections." We cannot see how the defendant could have been injured by the refusal of this instruction, as it was immaterial whether the defendant had a right to stop its cars at the further crossing or not. It was admitted that the car was in motion, and no claim was made that the driver or conductor refused to stop the car at the place where plaintiff boarded it. It cannot be assumed that danger of collision with the post could be always avoided because the company would stop at the further crossing when requested. The proximity of the track to the post may have been a menace of danger to persons on the car, or to persons forced by the crowded condition of the seats, or otherwise, to stand upon the platform. It has been held that it is inexcusable in a railroad company to permit an obstruction to stand so near its track as to render the use of the step or running-board dangerous to life or limb, inasmuch as exceptional cases may arise when it is lawful and proper for even a passenger to use such stepping-board. *Dickinson v. Pt. Huron & N. W. R'y Co.*, *supra*.

It is claimed that the court erred in refusing to give the following instruction: "The jury are instructed, as a matter of law, that if you believe, from all the evidence in this case, the plaintiff had no right to be where he was at the time of the accident, then the defendant was not answerable for the injury unless it was done willfully."

This instruction is somewhat obscure and was calculated to confuse the jury. It might have been understood by them as referring to the particular part of the car where the plaintiff was when he met with the accident. If he was merely using the step for the purpose of ascending into the car, he was where he had a

right to be. If he stood upon the step too long, it cannot be said that he was thereby such a trespasser as to relieve the company of any other liability than that of willful injury. The mere fact of riding on a platform of a street car is not conclusive proof of negligence. *City R'y Co. v. Lee*, 50 N. J. L. 435, and cases cited: *Topeka City R'y Co. v. Higgs*, 38 Kan. 375; *Huelsenkamp v. Citizens' R'y Co.*, 37 Mo. 537; *Messel v. Lynn & Boston R. Co.*, 8 Allen, 234; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Passenger R'y Co. v. Boudron*, 92 Penn. St. 475; *German-town Passenger R'y Co. v. Walling*, 97 Id. 55; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230; *Butler v. Glen Falls S. H. & F. E. S. R.R. Co.*, 121 N. Y. 112. Hence there was no error in refusing the instruction, if it was designed to call attention to the position of the plaintiff on the step or platform along the side of the car.

But, in their argument, counsel for appellant seem to construe the instruction as referring to the right of the plaintiff to be on the car at all. Even in this view it should not be left to the jury to determine what a man's right is, in a given case, without stating to them that such right would arise out of, or be based upon, certain facts which they might find from the evidence to exist. A right is, of itself, a mere abstract thing. The evidence of the defendant tended to show that there was posted in the cars of the company the following notice or rule: "Passengers will not be allowed to get on or off this car while in motion." The plaintiff swore that he never knew of any such rule, and that the only notice, which he ever saw posted in any of the cars, was one which forbade passengers to get on or off the front platform. Appellant claims, however, that appellee must be presumed to have known of the rule, because he was in the habit of traveling upon the cars, and that, inasmuch as he violated the rule in getting upon the car at the time of his injury, he was a mere trespasser, and not a passenger, and, therefore, not entitled to claim, at the hands of the company, that degree of care and skill which a carrier owes to its passengers.

The rule has reference to the mode of getting upon the car, and not to the relation between the company and a person already on the car. The rule by its phraseology recognizes even those who get on the cars while they are in motion as passengers. The

caution or warning is not to "persons" or "parties" getting on or off, but to "passengers" getting on or off. The rule contemplates future action by the company in stating that passengers "*will not be allowed*" to get on or off, etc., and, therefore, the enforcement of the rule may be waived. Whether such a rule has been waived or not will depend upon the circumstances of each case. Here the proof of the defendant shows that the conductor was standing on the back platform, leaning against the dashboard, and saw plaintiff and the policeman before they stepped upon the car, and was looking at the plaintiff as he boarded the car at the second seat from the rear platform, and continued to look at him until he was knocked off by the telegraph pole, and shouted to him to "look out" just before he was struck by the pole. He did not warn plaintiff not to get upon the car while it was in motion, but suffered him to step upon the platform without objection. It was a fair question for the jury whether, under all the circumstances, the plaintiff was not invited to get on the car. If he was so invited he was a passenger. In *Huelsenkamp v. Citizens' R'y Co.*, *supra*, it was said: "Though a passenger may have been upon the cars in violation of the rules of the railroad company, yet if it appears to the jury that these rules have been waived or revoked in his favor, he will, nevertheless, be entitled to his action for his injuries suffered from any want of care on the part of the company."

But we are not prepared to hold that a party is a trespasser after he gets on a horse car, even though no fare has been collected of him before he meets with an injury, simply because he has violated a rule of the company as to the mode of his getting on. The case of *C. B. & Q. R.R. Co. v. Mehlsack*, 131 Ill. 61, has no application here, because in that case the proof tended to show that the person receiving the injury was trying to "steal" a ride upon a train of steam cars.

It is not necessary that there be an express contract, in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract. The contract may be implied from slight circumstances, and it need not be actually consummated by the payment of fare, or entry into the car or boat of the carrier. "The whole matter seems to depend largely upon the intention of the person at the time he enters the boat, or cars,"

etc. Thompson on Carr. 42, 43. In *Butler v. Glen Falls & C. R. Co.*, 121 N. Y. 112, *supra*, it was said: "It does not seem reasonable to assume, as a matter of law, that a person who, in an orderly way, attempts to enter a street car as a passenger, is to be regarded as a trespasser until a special contract has been made with the conductor based upon the payment of the required fare." We find no evidence in the case at bar to show that the plaintiff did not take the car "for the purpose of being conveyed thereupon as a passenger for hire," according to the allegation in his declaration; nor does the proof show anything in the conduct of the conductor to indicate that he did not regard the plaintiff as a passenger. Hence, there was no proof to base the refused instruction upon, if it be admitted that it is capable of the interpretation sought to be given to it.

Appellant suffered no injury from the refusal to give an instruction which told the jury that the negligence of the defendant was not of itself sufficient to justify a recovery, because other instructions which were given required them to find not only such negligence of the defendant, but also the exercise of ordinary care by the plaintiff. Nor was there any error in refusing certain instructions as to comparative negligence. The jury were required by the instructions given to find, that the plaintiff was in the exercise of ordinary care, and that the defendant was guilty of such negligence as caused the injury. This was sufficient without confusing their minds by distinctions between the different degrees of negligence. They were also instructed, that the burden of proof was on the plaintiff, and that, before he could recover, he must prove his case, as alleged in the declaration, by a preponderance of the evidence. The declaration alleged both that the defendant was negligent, and that the plaintiff was exercising due care; and, therefore, both these prerequisites were required to be proven under the instructions given.

The judgment of the Appellate Court is affirmed.

**THE CHICAGO & ALTON RAILROAD COMPANY
v. ARNOL.**

Supreme Court, Illinois, January, 1893.

[Reported in 144 Ill. 261.]

RAILWAY COMPANY LIABLE FOR INJURIES TO PASSENGERS ON FREIGHT TRAINS.—A railway company that carries passengers for hire on its freight trains is liable for injuries to the passengers resulting from the negligence of those in charge of the trains.

PASSENGER ON FREIGHT TRAIN INJURED IN CAR WHICH WAS SUDDENLY JERKED FORWARD MAY RECOVER.—Where a passenger on a freight train, after the station was announced by the brakeman and the train stopped, arose from her seat to leave the car and almost instantly the car was jerked violently forward, and she was thrown to the floor of the car and injured, the railway company was liable.

APPEAL from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of McLean County.

Action by appellee to recover for personal injury alleged to have been occasioned by the negligence of the servants of the appellant company. A trial resulted in a verdict for plaintiff of \$2,500, upon which judgment was rendered, and which was, on appeal, affirmed in the Appellate Court. By its fourteenth instruction, appellant asked that the jury be instructed to return a verdict for defendant, which was refused. This ruling is, among other things, assigned for error, and will necessitate an examination of the record to see whether there was evidence tending to sustain plaintiff's right of recovery.

Appellant at the time of the alleged injury and for some months, at least, prior thereto, had run on its road daily, from Bloomington south, what was called "an accommodation train," consisting of a "caboose" attached to its regular freight train, which left Bloomington between 5 and 6 o'clock P.M. The record shows this train accommodated very considerable local travel, and on the evening in question the caboose was well filled. The train consisted of twenty-six freight cars and the caboose, and the train crew of an engineer, fireman, conductor and two brakemen.

Appellee took the train at Bloomington for Shirley, which was reached before nightfall. In approaching Shirley from the north

there is a gradual ascent until about the south end of the station platform, and then a descent somewhat more rapid for a considerable distance.

Upon approaching Shirley, a north-bound freight train was found standing upon the main track, and the south-bound train, on which appellee was a passenger, was required to take the siding. Upon nearing the switch, the engineer ceased working steam and slowed up to permit the brakeman on the forward end of the train to run ahead and open the switch, which was done, and the train passed through upon the siding at a rate of speed, as the engineer testifies, not faster than a man could walk. The rear brakeman stepped from the caboose, where he seems to have been stationed, closed the switch after the train, and regained the caboose.

The evidence tended to show the caboose stopped twice, the first time at the north end of the platform, or still farther north, and then was jerked forward and came to the final stop at the south end of the platform. Just where it stopped the first time, or how far the caboose ran, between that stop and the final one, is in controversy. Appellee and other witnesses place the first stop at the north end of the platform, and the distance run between the stops about thirty feet. Other witnesses place it much farther north, and the distance run much greater, some placing it as far as two hundred and fifty feet. The first stop is variously described as momentary; for an instant; and as continuing for ten or fifteen seconds, and it is clear that no opportunity was then given for passengers to leave the train.

Appellee testified, that upon the approach of the train to the station, the brakeman called out, "Shirley," "Shirley," in the usual manner of announcing the approach to the station. If the evidence of appellee and some other of the witnesses was credited, the jury were justified in finding that the caboose stopped at the north end of the station platform, after the usual station signal and call had been given by the brakeman.

Appellee testified, in effect, that having heard the station announced in the usual manner, and observing the slowing-up of the train and its coming to a standstill at the station platform, she arose from her seat with the intention of leaving the train, when instantly, and without warning, the caboose was jerked so

violently forward that she was thrown down to the floor of the car and seriously injured. Her head was thrown toward the rear of the caboose, and the passengers who went immediately to her assistance were thrown into confusion by the jar when the train came to the final stop. She was found to be insensible, and in that condition taken from the car. The engineer, thinking the siding south of the station too short to accommodate his train and let the caboose up to the platform, applied the air brakes with which the first seven cars of the train were equipped, thereby permitting the forward brakeman to run ahead of the engine and open the south switch, to let the engine out on the main track. The switch being open, the engine pulled out on the main track, and again came to a full stop. The nineteen freight cars, back of the seven equipped with the air brakes, were permitted to run free, no brake having been applied to any of them.

WILLIAMS & CAPEN and WILLIAM BROWN, for appellant, cited: *Shear. & Redf. on Neg.* (3d ed.) §§ 11, 12, 280; *Smith v. First Nat. Bank*, 99 Mass. 605; *Cotton v. Wood*, 8 C. B. (N. S.) 568; *Toomey v. Brighton R.R.*, Id. 146; *Curren v. Warren Chemical Works*, 36 N. Y. 153; *Welfare v. Brighton, etc. R.R.*, L. R., 4 Q. B. Cases, 693; *Terre Haute v. Aug. R.R. etc.*, 21 Ill. 186; *Tourtelotte v. Rosebrooke*, 11 Met. 460; *Daniel v. Met. R.R.*, L. R., 3 C. P. 216, 491; *C. B. & Q. R.R. Co. v. Harwood*, 90 Ill. 425; *C. B. & Q. R.R. Co. v. Gregory*, 58 Id. 272; *Blanchard v. L. S. & M. S. R.R. Co.*, 126 Id. 416; *Patterson's R'y Law*, § 373, and cases cited in note; *Frink v. Potter*, 17 Ill. 406; *C. B. & Q. R.R. Co. v. Hazzard*, 26 Ill. 373; *I. C. R.R. Co. v. Nelson*, 59 Id. 110.

BENJAMIN & MORRISSEY and W. B. CARLOCK, for appellee, cited: *Frink v. Potter*, 17 Ill. 406, 410; *O. A. M. R.R. Co. v. Muhling*, 30 Id. 92; *R.R. Co. v. Horst*, 93 U. S. 291, 296; *R.R. Co. v. Doane*, 115 Ind. 435; *Dunn v. Grand Trunk R'y*, 58 Me. 196; *Edgerton v. Saltonstall*, 13 Pet. 181; *R.R. Co. v. Pollard*, 22 Wall. 341; *Dougherty v. R.R. Co.*, 81 Mo. 325; *R.R. Co. v. Reynolds*, 88 Ill. 418; *Nance v. R.R. Co.*, 94 N. C. 619; *McNulta v. Enschede*, 31 Ill. App. 100; S. C., 134 Ill. 46.

Shope, J.—In this country it is the almost universal practice to announce the station which the train is approaching before it is reached, and while the train is still in motion. And it is universally understood that such announcement is intended as notice

to passengers, without warning to the contrary, that the next stop of the train will be at the station announced. The purpose is understood to be, to enable the passengers intending to alight at that station to be ready to leave the cars promptly, without undue haste or inconvenience to themselves or unnecessary delay of the train. It is not to be expected that there will be the same particularity in drawing up to a station by a freight train as by a train devoted to passenger service. The great length and weight of such trains and the appliances necessary in their operation render them less easy of control. And so the public, presumably, understand, and conduct themselves accordingly. In this connection, the errors assigned to the ruling of the court in refusing the tenth, eleventh, twelfth and thirteenth instructions asked by appellant may be considered.

These instructions severally told the jury that no recovery could be had under the first, second, third and fourth counts of the declaration.

The first, second and third counts allege that it was the duty of the defendant to safely carry plaintiff from Bloomington to Shirley, and there slacken the speed of its train with due care, and stop the same a reasonable time to enable plaintiff to alight, etc., and that the defendant did not use care and diligence in slackening the speed of its train, or stop its train at Shirley, etc., while the plaintiff was alighting therefrom, with due care, etc., caused the same to be suddenly and violently started forward, etc., whereby she was thrown down, etc., and injured.

The fourth count varies the same charge, and alleges that: "While the plaintiff, with the consent and permission of defendants, with due care, etc., was arising from her seat to alight," etc., the defendant caused the train to be suddenly started, etc., whereby, etc.

The implied contract to carry safely necessarily includes the furnishing of reasonable opportunity to alight from the train safely at the end of the journey. *R.R. Co. v. Aspell*, 23 Pa. St. 147; *Imhoff v. Chicago, etc. R.R. Co.*, 20 Wis. 36; *Jeffersonville R.R. Co. v. Hendricks' Admrs.*, 26 Ind. 228; *Burrows v. Erie R'y Co.*, 63 N. Y. 556; *Dougherty v. Chicago, etc. R'y Co.*, 86 Ill. 467; *W. St. L. & P. R'y Co. v. Rector*, 104 Ill. 296.

Whether appellee was, under the circumstances shown, justified in assuming that it was the intention of those in charge of the train to discharge passengers for Shirley at the time and place of the first stop of the caboose in which she was riding, was a question of fact for the jury. If the conduct of appellant's servants and their management of the train amounted to an invitation to then alight, and would be so understood and acted upon by reasonable and prudent persons, and appellee, acting in good faith upon such invitation, arose, upon the train coming to a standstill, for that purpose, the jury would be justified in finding that she was in the exercise of ordinary care for her own safety. If she, by reason of such apparent invitation, was placed in peril from the farther movement of the train, the duty at once arose, on the part of appellant, to stop its train a sufficient length of time to permit her to leave it in safety, or to warn her of the danger in time to avert injury. And it could not, in such case, be material whether the shock to the train producing the injury was an incident of the ordinary operation of the train, or was extraordinary and unnecessarily violent. The duty of the carrier was to be measured by the peril to the passenger whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger. In *McNulty, receiver, etc. v. Enschede*, 134 Ill. 46, speaking of the duty of the receiver, who was operating the railroad, we said: "Having, by the acts and conduct of his servants, justified the plaintiff in attempting to get off the train, the duty of defendant attached to stop his train at the station a sufficient length of time to enable the plaintiff to reach the platform in safety," and held, that the duty related to the place where the plaintiff had been induced, by the conduct of the servants and the stopping of the train, to believe he was to alight, and not to the final stopping of the train after the injury, a few feet further on, at the same platform. See, also, *Tabor v. Del. etc. R.R. Co.*, 71 N. Y. 489; *Cent. R'y Co. v. Van Horn*, 38 N. J. L. 133; *Columbus, etc. R'y Co. v. Farrell*, 31 Ind. 408; *Bridges v. North London R'y Co.*, L. R. 7 H. L. 213 (1); *Nance v. R.R. Co.*, 94

1. For the facts of this case, see note 1 on p. 41, *ante*.

N. C. 619; *Praeger v. Bristol, etc. R'y Co.*, 24 L. T. (N. S.) 105 (1).

But it is insisted that the rule announced in these cases has no application here, for the reason that appellee, having voluntarily taken passage upon a freight train, assumed all risk incident to the operation of such train in the usual and ordinary manner in which such trains are managed and operated. Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all of the ordinary inconveniences, delays and hazards incident to such trains, when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill. The passenger has a right to presume that the train is thus made up and equipped, and that the cars, machinery and appliances are not, of their kind, so materially defective as to increase the ordinary hazards of transportation by such trains. He may take the train or not at his option, and if he voluntarily selects such a train, he should be and is held to have accepted it in discharge of the liability of the carrier to provide a safer and better mode of conveyance, and to have assumed the risk and inconvenience incident to its proper management and operation.

But if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibility for their safe

1. In *Praeger v. Bristol & Exeter R'y Co.*, 24 L. T. (N. S.) 105 (Court of Exchequer Chamber, March, 1871) it appeared that plaintiff was a passenger on one of defendant's trains. When the train arrived at plaintiff's destination it stopped at a point about fifteen feet from the extreme end of the road. This left the coach in which plaintiff was being carried opposite a portion of the station platform that was curved back about two feet from the rails. A guard opened the

door of the compartment, but said nothing, and plaintiff stepping out, as he thought, upon the platform, fell and was injured. It was dark at the time and the station was only dimly lighted. *Held*, that the above facts furnished evidence sufficient to go to the jury, it being evident from them that there was a clear invitation to the plaintiff to alight, and that, though the danger was not apparent to him, he was not warned.

carriage is not otherwise relaxed. From the composition of such a train and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from the negligence or want of proper care of those in charge of it. Ordinarily, carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence practically consistent with the efficient use and operation of the mode of transportation adopted. *Tuller et al. v. Talbott*, 23 Ill. 357; *C. B. & Q. R.R. Co. v. Hazzard*, 26 Id. 373; *C. & A. R.R. Co. v. Pillsbury*, 123 Id. 9, and case cited. And this rule applies, in the absence of a valid contract limiting the liability of the carrier whenever the relation of passenger and carrier is established. While it is said that the "utmost care" and the "highest degree of diligence" is to be exercised, it is to be understood that the care and diligence exacted is not such as will exclude all possible peril, or required to be of that degree that will render the use of the instrumentalities of transportation known to be employed impracticable; but it always has relation to the mode of conveyance accepted and used, and the conditions and circumstances necessarily attendant. In the operation of freight trains the primary object is the carriage of freight, and the appliances used are, and are known by the passengers to be, adapted to that business, and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation that would destroy the use of the train for its primary purpose. But the law does require that the highest degree of care be exercised that is practicable and consistent with the efficient use of the means and appliances adopted. And the carrier must accordingly be held to the same strict accountability for negligence of its servants injuriously affecting the passengers, as it would be if the transportation had been by a train devoted to passenger service exclusively.

We need not extend this opinion by further discussion of the reasons for the rule; it is based upon a wise public policy, as well as upon the plainest principles of reason and justice, and is sustained by authority. *R.R. Co. v. Muhling*, 30 Ill. 9; *C. B. & Q. R.R. Co. v. Hazzard*, 26 Id. 381; S. C., 1 Biss. 513; *I. & St. L. R.R. Co. v. Horst*, 93 U. S. 291; *Ohio, etc. R'y Co. v. Dickerson*, 39 Ind. 317; *R.R. Co. v. Doane*, 115 Id. 435; *P. & C. R'y Co. v. Thompson*, 56 Ill. 138; *Edgerton v. N. Y. & H. R.R. Co.*, 35 Barb. 389; S. C., 39 N. Y. 227; *De Laye v. N. Y. Cent. R'y Co.*, 56 Barb. 227; *Dunn v. G. T. R'y Co.*, 58 Me. 187.

If, therefore, appellee was, in consequence of conduct of appellant's servants and their management of the train, placed in danger of injury from its farther movement, and the train was jerked forward without notice or warning of the danger, and she was thereby injured, appellant would be liable. It is no answer to say that the train was operated in the ordinary and usual manner of running and operating freight trains. The duty of the carrier was to be measured by the peril of the passenger, whom it had accepted and undertaken to safely carry, and who had been needlessly put in danger by the acts of its servants, and its responsibility by the consequences that might result to her from a failure to observe that duty. There being evidence tending to establish a neglect of the duty charged in the first, second, third and fourth counts of the declaration, the tenth, eleventh, twelfth, thirteenth and fourteenth instructions asked by appellant were properly refused.

It is objected that the court erred in giving appellee's second and third instructions. These instructions were based upon the theory that it was the duty of appellant to stop its train long enough at the first stop, shown by the evidence, to permit the plaintiff to alight in safety, and while, perhaps, not strictly accurate, they each state the law as applicable to the fact shown with substantial correctness.

It was undoubtedly the duty of the railway company to bring its train to a full stop, "with due and proper care and caution, with reference to the personal safety of the passengers, and, thereupon, not to start or move forward such train in an improper and dangerous manner at a time when such passengers might rightfully, in the exercise of due care and caution, arise from their

seats and prepare to leave the train at such station." In our view the proposition quoted contains a substantially accurate proposition of law, and no further discussion will be necessary.

Nor will it be necessary to discuss or determine whether there is evidence to sustain the allegations of negligence charged in other counts of the declaration, or whether permitting the nineteen freight cars to run free upon the down grade, without any attempt to control them, thereby communicating an accelerated jerking motion to the caboose, was negligence in the operation of the train.

We find no error in this record for which the judgment of the Appellate Court should be reversed, and it is accordingly affirmed.

NORTH CHICAGO ST. RAILROAD CO. v. COOK.

Supreme Court, Illinois, March, 1893.

[Reported in 145 Ill. 551.]

STREET CAR STARTED BY SIGNAL FROM PASSENGER.—If a signal to start a street car is given by an unauthorized person, that fact will not relieve a railway company from liability for an injury to a passenger, when the conductor by the exercise of due care could have prevented the moving of the car.

RAILROAD COMPANY LIABLE FOR INJURY THROUGH CAR BEING STARTED BY SIGNAL FROM A PASSENGER.—Where it appeared that a man seventy-eight years of age signaled a street car to stop, and while it was stationary attempted to get on, and as he was in the act, with his hands on the rail of the car, it was started by the signal being given by a passenger, and the man was thrown to the ground and injured, the railroad company was liable, although the conductor did not know that any one was attempting to get on the car.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County.

Appellee, seventy-eight years old and infirm, being a partial paralytic, standing at a street corner, signaled to appellant's cars to stop and take him on. The cars passed him a short distance and stopped to let a passenger off; persons on the rear platform beckoned to appellee to come on, whereupon he hobbled along and caught hold of the handrail of the car, and before he could step up on the step of the car, the car suddenly started, by which

he was pulled off his feet, thrown to the ground, his arm broken, and he was otherwise injured. The conductor denies that he gave any signal to start the cars, and the evidence raises the presumption that someone, a passenger probably, did give such signal. The conductor, at the time, was on or near the front platform collecting fares, and as soon as the injury to appellee occurred the car was stopped and he ran back to where appellee was lying, and, with the aid of passengers, carried him into an adjacent drug store. The jury returned a verdict, and judgment was entered thereon, for \$1,625.

On appeal to the Appellate Court, the judgment was affirmed, and the railroad company prosecutes this further appeal.

EDMUND FURTHMAN, W. J. HYNES and H. H. MARTIN, for appellant, cited: *I. C. R.R. v. Frelka*, 9 Bradw. 605; *Joliet v. Henry*, 11 Bradw. 154; *Reed v. R.R. Co.*, 57 Iowa, 23; *Duke v. R.R. Co.*, 99 Mo. 347; 2 *Shear. & Redf. on Neg.* (4th ed.) § 759; *Eckerd v. R'y Co.*, 70 Iowa, 353; *Nichols v. R'y Co.*, 68 Id. 732; *R'y Co. v. Shannon*, 11 Bradw. 222; *R'y Co. v. Birney*, 71 Ill. 391; *I. C. R.R. v. Weldon*, 52 Id. 290; *R'y Co. v. O'Brien*, 19 Bradw. 28; *R'y Co. v. Bisbane*, 24 Id. 463; *R'y Co. v. Shannon*, 11 Bradw. 226; *R'y Co. v. Birney*, 71 Ill. 391, 394, 395.

SAMUEL W. PACKARD, for appellee, cited: *Thomp. on Pas. Car.* 16, 572; 2 *Sedg.* (8th ed.) § 483; 3 *Sunderland on Damages*, 269; *Shear. & Redf. on Neg.* (4th ed.) §§ 508, 759; *Klien v. Thompson*, 19 Ohio St. 569; *Varnum v. Council Bluffs*, 52 Iowa, 698; *Ind. v. Gasten*, 58 Ind. 277; *Penn. Co. v. Marion*, 104 Id. 239; *Fisher v. Jansen*, 30 Ill. App. 92; 128 Ill. 549; *Walker v. Cook*, 33 Ill. App. 563; *Linn v. Sigsbee*, 67 Ill. 75; *Rogers on Expert Test.* (2d ed.) § 8; *Morrison v. Broadway & S. A. R.R. Co.*, 8 N. Y. Suppl. 436; *Dougherty v. Mo. P. R'y*, 81 Mo. 330; *Keating v. R.R. Co.*, 49 N. Y. 673; *Nichols v. R.R. Co.*, 38 Id. 131; *Maher v. R.R. Co.*, 67 Id. 52; *C. & N. R'y Co. v. Drake*, 33 Ill. App. 114; *City R'y Co. v. Mumford*, 97 Ill. 570; *C. W. D. R'y v. Mills*, 105 Id. 63.

Shope, J.—Upon looking into this record, to determine whether the instructions were substantially accurate as applied to the facts, we are led to agree with the Appellate Court that if, "Under the evidence shown in this record, had there been a judgment for the defendant, it would have been our duty to set it

aside." Counsel have filed in this court their Appellate Court briefs, containing a discussion of the questions of fact which are eliminated by the judgment of that court. Numerous objections are made to the instructions given and to the ruling of the court in admission of testimony, the more important of which will be considered.

1. It is insisted, the court erred in giving appellee's instruction in respect of the measure of damages, which is as follows:

"In estimating the plaintiff's damages, if the jury find for the plaintiff, it is proper for the jury to estimate the effect of the injury in the future upon the plaintiff's health, if any, as well as the effect it has had upon him already, and the bodily pain and suffering, if any, endured by him, including the necessary expenses and all damages, present and prospective, which can be treated as a necessary result to the injury, if any, inflicted by the defendant upon the plaintiff."

The objection is, that the jury are allowed, in case they found for appellee, to award him damages for "necessary expenses," in and about being healed, etc. The evidence showed that appellee had an arm broken, and was otherwise injured; that a physician attended him in setting the bone of the arm, for which he was paid. And also, that another physician attended him during his illness following the injury. But there is no evidence as to the amount paid, or what would be a reasonable charge for the services rendered. We are of opinion that it was error to give the instruction in the absence of all proof tending to show the proximate amount or value of said services. *Shear. & Redf. on Neg.* 759; *Reed v. R.R. Co.*, 57 Ia. 23; *Duke v. R.R. Co.*, 99 Mo. 347; *Eckerd v. R.R. Co.*, 70 Ia. 353; *R.R. Co. v. Frelka*, 9 Brad. 605; *Joliet v. Henry*, 11 Brad. 154; *C. B. & Q. R.R. Co. v. Hale*, 83 Ill. 360.

But we are of opinion, also, that while the instruction standing alone was erroneous, the giving of it in connection with the series of instructions given was not prejudicial error. By repeated instructions the jury were told, that their findings must be from the evidence; and in an instruction, given on behalf of appellant, the jury were told that, if they should find for the plaintiff, no exemplary or punitive damages "can be allowed." "All that the jury would have a right to consider would be simply compensatory

damages, . . . that is to say, the damages should be purely compensatory and the basis for estimating it must be *data* appearing in the evidence, and not mere conjecture." It was the duty of the jury to consider the instructions as a whole, and give due and proper weight to each of them, and it is presumed they did so. 2 *Thomp. on Trials*, § 2407. If the instructions, when construed together, present the law with substantial accuracy to the jury, and the objectionable instruction is so qualified by others that it is not calculated to mislead them, it will ordinarily afford no ground for reversing the judgment. *Id.*; *Spies v. The People*, 122 Ill. 245; *T. W. & W. R'y Co. v. Ingraham*, 77 Id. 309; *Kendall v. Brown*, 86 Id. 387; *Skiles v. Caruthers*, 88 Id. 458; *C. & E. I. R.R. Co. v. Hines*, 132 Id. 169.

Without proof of the value of the medical attendance, medicine, etc., nominal damages only could have been awarded; that is, no *data* would have been furnished by the evidence for awarding other than a nominal sum. There is nothing in this record to indicate that the jury were misled, or gave damages other than such as were purely compensatory, having for their basis *data* appearing in the evidence, or that they were led into the field of conjecture.

2. It is also insisted that the court erred in giving the following instruction:

"If the jury believe from the evidence, that some person not in the employment of the defendant company rung the bell which started the train at the time in question, still that fact will not exempt the defendant company from liability in this case; provided, the jury believe from the evidence that the conductor could, by use of due care and diligence, have countermanded the unauthorized signal for starting the train in time to have prevented any injury to plaintiff, if he, the conductor, had exercised due care and diligence in the discharge of his duties; and, provided the jury believe from the evidence the plaintiff at the time in question was in the exercise of reasonable care and diligence for his own safety."

The point made is, that the instruction "failed to submit to the jury the question as to whether or not reasonable care on the part of the conductor required that he should have countermanded the signal, even if he could have done so in time to have pre-

vented the injury to the plaintiff." And that, as a matter of law, the fact that "the conductor might, by the exercise of due care and diligence, have countermanded the signal," even if the conductor did not know, and had no reasonable ground to believe, that anyone was attempting to get upon the car, would make appellant liable, although the signal had been given by a stranger. We see no objection to the instruction. It was the duty of appellant to stop its car a sufficient length of time to enable appellee to get fully and safely on the same. *City R'y Co. v. Mumford*, 97 Ill. 560; 2 *Shear. & Redf. on Neg.* § 508; *Thomp. on Car. Pass.* § 16; *Dougherty v. Mo. Pac. R'y*, 81 Mo. 330; *C. & A. R.R. Co. v. Wilson*, 63 Ill. 167; *Chi. W. D. R'y Co. v. Mills*, 105 Id. 63; *C. & A. R.R. Co. v. Arnol*, 144 Ill. 261. Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill and diligence for the safety of the passengers that is consistent with the mode of conveyance employed. The car or train was in control of the conductor, and he was required to know, if by the exercise of due care, caution and diligence in the discharge of his duties he could know, whether any person was attempting to get on or off his train of cars, before permitting the same to start in such manner as would be liable or likely to injure a person so getting on or off the same. It was a duty appellant owed to the public, to be discharged through its conductors or other agents whom it might select, to afford its passengers time and opportunity to board and depart from its cars in safety. The fact, therefore, if it be conceded that the signal for starting was given by an unauthorized person, would not exempt the railway company from liability, if the conductor or agents of the railway company in charge, by the exercise of due care and diligence, could have prevented the moving of the car, and thereby avoided the injury.

3. Objection is made to the ruling of the court in the introduction of testimony. Appellee was asked the question: "How long were you confined to bed on account of this injury?" To which he answered: "From the 15th of May to about the 1st of August." And also the question: "Have you suffered any pain in consequence of the injury?" Which was answered in the affirmative. It is said: "These questions were improper, as calling for the opinion of the witness as to the cause of his being

confined in bed, of his suffering pain," etc. Appellee and others testified that his arm was broken, that he was otherwise injured, and that following the accident, he had been confined to his bed. We are of opinion that there was no error in permitting the questions to be answered. Whether appellee suffered pain from a broken arm was a fact that required no expert skill to ascertain. Nor did it require expert knowledge or skill to determine the fact that appellee required help to put on his coat; or that, in consequence of his broken arm, his food had to be cut for him. True it is, as said by counsel, that the question for the jury to try was whether the changed physical condition of appellee was "on account of" or "in consequence of" the injury complained of. It requiring no expert skill or scientific knowledge to determine the facts testified to by appellee, no error was committed in permitting him to answer the questions.

It is said, however, that it having been shown that appellee was aged and infirm, and to some extent a paralytic, the assumption that the confinement to his bed, the pain he suffered and the like, resulted from the injury, invaded the province of the jury. It was competent for the appellee to testify to his condition resulting from the injury and the effect produced by it. *Wright v. Ft. Howard*, 60 Wis. 122; *Creed v. Hartman*, 8 Bosw. 123.

Other objections are pointed out which we have carefully considered, and do not deem them of sufficient importance to merit discussion. That there are some slight errors may be admitted; but they are not of such character that they could have prejudiced appellant before the jury, under the facts proved.

The judgment of the Appellate Court is correct, and should be affirmed.

**THE NORTH CHICAGO STREET RAILROAD
COMPANY v. WRIXON, ADM'R. (1)**

Supreme Court, Illinois, June, 1894.

[Reported in 150 Ill. 532.]

FAILURE OF APPELLANT TO PRESENT REFUSED INSTRUCTIONS TO APPELLATE COURT PREVENTS HIM FROM RAISING POINT IN SUPREME COURT.—On an appeal to the Appellate Court an appellant who fails to give in his abstract the refused instructions and states in his brief that no point is raised as to them, thereby waives his right on appeal to the Supreme Court to assign for error the refusal of the instructions by the trial court.

ENTRY OF JUDGMENT AFTER REMITTING PART OF VERDICT AFTER JUDGMENT OF REVERSAL SET ASIDE, PROPER.—Where, after an order of reversal by the Appellate Court, the plaintiff on motion had the judgment of reversal set aside, and entered a remittitur of a part of the amount of the verdict, and the Appellate Court entered judgment for the balance of the amount, no error was committed, although the action was for unliquidated damages for a tort.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County. The points raised on appeal appear in the opinion.

EGBERT JAMIESON and EDMUND FURTHMAN, for appellant.

ARNOLD HEAP and ROSENTHAL & HIRSCHL, for appellee.

Shope, J.—This was an action by appellee, administrator of the estate of William P. Wrixon, deceased, against appellant to recover for the use of next of kin damages for personal injuries to said William P. Wrixon, alleged to have been caused by the negligence of appellant, and which resulted in his death. A trial by jury in the Circuit Court resulted in a verdict for \$5,000. Motion for new trial was overruled, and judgment rendered for that amount. On appeal to the Appellate Court, a remittitur of \$2,500 was entered by the plaintiff, and the judgment affirmed for the residue of \$2,500. The railway company brings the case to this court and urges two grounds for reversal of the judgment of the Appellate Court: First, "The trial court erred in refusing each and every of the instructions by it refused, asked by

1. Affirming 51 Ill. App. 307, 2 Cited in Penn. Coal Co. v. Kelly,
Am. Neg. Cas. 528. 156 Ill. 9, 17.

defendant." Second, "The Appellate Court erred in entering the remittitur and affirming the judgment of the trial court."

The instructions which it is urged the court erred in refusing are numbered by counsel in their brief as 1, 2 and 3. We are not called upon to determine whether error intervened in the refusal of these instructions or not, but it may be said that the fact of negligence on the part of the defendant, and whether the plaintiff's intestate exercised such reasonable care and caution for his own safety as are usually exercised by children of the same age and degree of intelligence was submitted to the jury by proper instructions. *City of Chicago v. Keefe*, 114 Ill. 222; *Chicago City R'y Co. v. Wilcox*, 138 Id. 370. These questions of fact are settled adversely to appellant by the judgment of the Appellate Court, and are not here open to review.

A sufficient answer to the alleged error, that the court erred in refusing the instructions numbered 1, 2 and 3, is that appellant has waived its right to insist upon that error, if error it was. In the abstract filed in the Appellate Court, and which has been filed by appellee in this court, the refused instructions were not abstracted, and thereby brought to the attention of that court. In the brief of appellant filed in that court the points urged for reversal are: "First, the verdict in this case is contrary to law; second, the verdict in this case is contrary to the evidence; third, the verdict in this case was excessive." Each of these points, and none other, was urged as properly raised upon the motion for new trial in the trial court, and it is expressly stated by counsel in their brief that "no point is raised on the giving or refusal of instructions." Our attention, and that of counsel for appellant, is directly called to these facts, and that the brief and abstract of appellant in the Appellate Court have been here filed by the brief of appellee, and no question is made as to the accuracy of these statements, nor is it pretended that any other abstract or brief was filed by appellant in the Appellate Court. Nor does it appear that the question arising upon these instructions was considered by that court. We are justified, therefore, in assuming it to be admitted that in the Appellate Court appellant abandoned any assignments of error upon refusal of the court to give instructions asked by it. That being so, appellant is in no condition to insist upon the error here. A party cannot take the judgment of

that court upon a question of fact merely, and waive questions of law arising upon instructions, and, when beaten upon the fact, insist in this court upon error of law which was withdrawn from the consideration of that court. To permit such practice would be unfair to the Appellate Court, would entail unnecessary expense upon the parties litigant, and incumber the dockets of the courts with unnecessary litigation.

The only question raised by counsel properly before us is, whether the Appellate Court erred in entering a remittitur at the instance of the plaintiff below. Upon consideration of the case, that court entered judgment January 11, 1894, reversing and remanding the cause. On January 15, 1894, being one of the days of the same term of that court, appellee moved that the order of reversal and remandment theretofore entered be set aside, and at the same time filed a remittitur of \$2,500 of the judgment. Thereupon the court set aside and vacated its former order and judgment, and entered a judgment affirming that of the court below for the sum of \$2,500, and rendered judgment for said amount in favor of appellee and against appellant, and for costs, etc.

It is insisted that in actions where the recovery is of unliquidated damages, a remittitur may not be entered, and the error existing in the verdict and judgment, because it is excessive, thereby cured. The difficulty of settlement of this question upon principle is fully recognized, but we are committed to the practice of allowing remittitur in actions *ex delicto*, both in the trial and Appellate Courts, to such sum as shall to the court seem not excessive, and affirming as to the balance of the judgment. By section 81 of the Practice Act the entry of remittitur in the appellate courts is authorized. It may not be amiss to here collate some of the leading cases in the State upon the question.

Thomas v. Fischer, 71 Ill. 576, was an action on the case for slander. The jury returned a verdict for \$1,600, and, on motion for new trial, plaintiff remitted one-half and judgment was entered on the verdict for the balance—\$800. It was there insisted that by the remittitur plaintiff conceded the verdict to be unjust, etc., and that the defect was not cured thereby, but that the error could be corrected only by submission of the cause to another jury, citing in support of this view, *Thomas v. Wormack*, 13 Texas, 580, *Nudd v. Wells*, 11 Wis. 407, and *Clafin v.*

Delaney, 38 N. Y. 138, and as particularly sustaining the contention, in so far as "that, in a case sounding wholly in damages, and where the damages are unliquidated, the court cannot order a remittitur as the alternative for a new trial." But it was there said: "That a party himself may remit in such cases is a practice so interwoven with our jurisprudence, we are unwilling to disturb it. The rule is, in our practice, where a jury has passed upon a question of unliquidated damages, though the court below may have no right to direct the plaintiff to remit, or a new trial shall be had, yet if the plaintiff himself, on a motion for a new trial being made, voluntarily remits part of the damages, the verdict must stand for the balance—and this, for the reason that it is necessary an end should be put to litigation, and actions for vindictive damages not be encouraged."

Ill. Cent. R.R. Co. *v.* Ebert, 74 Ill. 399, was an action to recover damages for injuries sustained by plaintiff in a collision on defendant's road. Verdict was returned for \$10,000 and, on motion for a new trial, plaintiff, by his attorney, remitted \$6,000 of the finding, and the court entered judgment for the balance—\$4,000; and the learned Justice Breese, who delivered the opinion of the court in the preceding case, while criticising the rule which has obtained in such cases, again declared the practice to be too firmly established to be displaced, and the judgment was affirmed.

Loewenthal *v.* Streng, 90 Ill. 74, was an action on the case for malicious prosecution, and a verdict was returned for plaintiff for \$10,000. Motion for new trial was made and overruled, whereupon the plaintiff entered remittitur of \$4,000 and judgment was rendered for \$6,000. The court, by Justice Walker, regarding the verdict as "outrageously excessive," said: "It could only have been induced by prejudice, passion or total misconception of the case; and when it is so flagrantly excessive as to be only accounted for on the ground of prejudice, passion or misconception, the remittitur does not remove the prejudice, passion or misconception." The court, however, does not there reverse the judgment on this ground, but on the ground that they still regard it, notwithstanding the remittitur of \$4,000, "as grossly excessive."

Albin *v.* Kinney, 96 Ill. 214, was an action on the case against a physician for alleged malpractice in his treatment of the plaintiff. By leave of the court, plaintiff entered a remittitur of part

of the verdict and judgment was rendered for the residue, and it was there said: "The practice of permitting a remittitur of a portion of the verdict found, even in actions sounding in damages, is so well settled that the point made against the judgment in this case, on account of the remittitur entered, need not be discussed as a new question. The rule is uniform, that when there is a motion for a new trial on the ground of excessive damages, plaintiff may, if he chooses, remit a portion of the verdict to obviate the objection. The court cannot compel a plaintiff to remit any portion of his verdict, but he may have his election to do so, or stand the chances of another verdict."

Union Rolling Mill v. Gillen, 100 Ill. 52, was an action for injuries sustained by the plaintiff by reason of the negligence of the defendant. The jury found a verdict for plaintiff for \$5,000. A remittitur having been entered by plaintiff of \$2,000, the court rendered judgment upon the verdict for \$3,000. It was contended in this court that entry of judgment upon the verdict was erroneous—that while the practice might be proper to allow remittitur in actions *ex contractu*, it was otherwise in actions *ex delicto*, and that in such latter cases, if the jury was unfair in assessing the damages, it should be taken for granted that the jury was also unfair in deciding upon the issue. The court there held the practice to be established of allowing remittitur in actions *ex delicto* as well as *ex contractu*, citing cases *supra*.

In *Libby et al. v. Scherman*, 146 Ill. 554, which was an action for personal injury caused by the negligence of the defendant, the court held the rule to be so firmly settled in its application to such cases as to be beyond question.

The practice of allowing entry of remittitur in the Appellate Court was expressly sanctioned in *C. B. & Q. R.R. Co. v. Dickson*, 88 Ill. 431. That was an action to recover damages for personal injury inflicted by the negligence of the defendant railroad company. A judgment had been rendered for \$6,500, which was complained of as excessive. After appeal to this court a remittitur of \$2,500 was entered, and the judgment for the amount of \$4,000, being the amount of the judgment less remittitur, was affirmed.

Without continuing the citation of cases, enough have been given to show the practice in this State; and while in some of

them the rule has been strongly criticised, it has been adhered to, and has become the uniform practice in all the courts of the State, and ought not now to be changed.

The judgment of the Appellate Court is affirmed.

THE NORTH CHICAGO STREET RAILROAD COMPANY v. ELDRIDGE. (1)

Supreme Court, Illinois, May, 1894.

[Reported in 151 Ill. 542.]

PASSENGER INJURED WHILE ALIGHTING FROM STREET CAR AT A PLACE OTHER THAN USUAL NOT BARRED FROM RECOVERY BY THAT FACT.—Where it appeared that a passenger in attempting to alight from a street car that came to a stop to allow another car to cross in front, was injured by her dress catching in a bolt that projected above the floor of the car, the fact that the usual place of alighting was on the other side of the cross street would not alone justify the jury in finding her guilty of such negligence as would bar a recovery, unless that fact was the proximate cause of the injury.

INSTRUCTION AS TO CARE EXERCISED BY PLAINTIFF.—A refusal to instruct that if the plaintiff might have discovered the bolt by the exercise of ordinary care, then her catching her dress on the bolt was negligence *per se*, was proper.

Also a refusal to instruct that if the injury was due to plaintiff's haste in alighting she was guilty of negligence *per se*, was proper.

APPEAL from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County. The facts appear in the opinion.

WILLIAM B. KEEP, for appellant.

JOHN F. WATERS, for appellee.

Bailey, J.—This was an action on the case brought by Lizzie E. Eldridge against the North Chicago Street Railroad Company, to recover damages for a personal injury received by the plaintiff while attempting to alight from one of the defendant's cars. The negligence charged in the declaration consisted of the defendant's carelessly and negligently using, for the transportation of its passengers, a car so unfinished and incompleated, and in such bad and

1. Affirming 51 Ill. 430, 2 Am. 59 Ill. App. 463, 2 Am. Neg. Cas. 532. 539; Bradley v. Sattler, 156 Ill. 603, Cited in I. C. R. Co. v. O'Connell, 607.

unfinished condition that, by reason thereof, the plaintiff's clothes were caught on the car while she was alighting therefrom, whereby she was thrown down from and off the car, to and upon the ground, and thereby received the injuries complained of.

The trial, which was had upon a plea of not guilty, resulted in a verdict finding the defendant guilty and assessing the plaintiff's damages at \$13,500. While the defendant's motion for a new trial was pending, the plaintiff remitted \$3,500 from her damages, and the court thereupon denied the motion, and rendered judgment in favor of the plaintiff for \$10,000 and costs. On appeal to the Appellate Court that judgment was affirmed, and this appeal is from the judgment of affirmance.

The evidence tends to show that the plaintiff, at the time of her injury, was a passenger on one of the defendant's cable cars running south on North Clark street. The car was an open one, with the seats running across it, and was entered and alighted from by means of a foot-board suspended upon iron bolts, and running the entire length of the car. The plaintiff was riding on the westerly track, and the car had stopped just north of Division street to allow a Lincoln avenue car to pass in front of it. As the car stopped, the plaintiff, who was desirous of taking a State street horse car, which was standing near, and for which the conductor had given her a transfer, attempted to alight from the easterly side of the car, so as to pass over the easterly cable track to the State street car. It appears that a north-bound cable train was approaching from the south on the easterly track, and was at the time within a short distance. The plaintiff, in getting off the car, was compelled to pass in front of another passenger who was sitting at the easterly end of the same seat, and as she was stepping down from the car, as the evidence tends to show, the bottom of her dress caught on the head of a bolt which was projecting some distance above the floor of the car, whereby she was held fast, but as her dress was torn from its fastening she was thrown forward, and after taking three or four steps, sufficient to carry her across the space between the tracks and the easterly track, she was thrown heavily to the ground, and received the injuries complained of.

The facts being conclusively settled by the judgment of the Appellate Court, we must assume that the verdict of the jury is

the proper result of the evidence. The question of the defendant's negligence as charged, or of contributory negligence on the part of the plaintiff, is not open for consideration here, as both of those are conclusively settled in the plaintiff's favor. Nor is the contention that the damages recovered by the plaintiff are excessive one which can be properly addressed to this court, as that necessarily involves questions of fact which the statute has withdrawn from our appellate jurisdiction. The only questions raised by counsel in his brief which are open for consideration here, therefore, are those which relate to the rulings of the court in the instructions to the jury.

Complaint is made of the first instruction given at the instance of the plaintiff, which was as follows:

"1. Although you may believe that the plaintiff got off from the car at the north side of Division street, when the usual place for alighting was on the south side of Division street, that fact alone would not justify you in finding her guilty of such negligence as would bar a recovery in the case, unless you believe and find that it was the proximate cause of the injury."

We are unable to discover any error in the legal proposition embodied in this instruction. It is true, as has already been noticed, that the car on which the plaintiff was riding was stopped just north of Division street, for the purpose of allowing a Lincoln avenue car to cross the tracks in front of it, and that the plaintiff, instead of waiting until her car reached the south side of Division street and stopped at the usual place for discharging passengers from cars going south, attempted to alight at the place where the car first stopped. As the car was standing still, and was likely to remain so for a sufficient time for her to get off in safety, it was, so far as we can see, entirely consistent with the exercise of reasonable care on her part, for her to attempt to alight at that place. We are unable to see that her doing so was likely to be attended with any greater danger than would her attempting to leave the car at the usual stopping place on the other side of Division street. It was, therefore, entirely proper for the court to instruct the jury, that her conduct in that respect would not, of itself, justify a finding that she was guilty of such negligence as would bar her recovery, unless the evidence showed that it was the proximate cause of her injury.

But it is suggested that the jury may have been misled by the instruction into supposing that the defendant relied for its defense solely upon the negligence of the plaintiff in getting off on the north side of Division street instead of waiting until her car reached the usual stopping place. We are unable to see how the instruction could have had that effect upon the minds of the jury, especially in view of the fact that, by other instructions given at the instance of the defendant, their attention was specifically called to each of the several defenses relied upon by the defendant. It is admitted that the defendant's counsel insisted at the trial that the plaintiff's alighting north of Division street was, under the circumstances proved, an act of negligence, and in view of that contention, it was proper for the plaintiff to ask and for the court to give an instruction on that point.

Exception was also taken by the defendant to the refusal by the court to give to the jury its fifth, eighth, twelfth, thirteenth and nineteenth instructions. Those instructions were as follows:

"5. The jury are instructed, as a matter of law, that the burden of proof in this case is upon the plaintiff, and if you believe from the evidence in this case that the negligence of the plaintiff and defendant was equal, or nearly so, in such case, your verdict should be for the defendant.

"8. The jury are instructed, as a matter of law, that the mere omission on the part of the defendant to perform any duty which it ought to perform, is not, of itself, sufficient to render the defendant liable.

"12. The court instructs the jury, as a matter of law, that if the plaintiff knew, or might by the exercise of ordinary care have discovered the bolt in question, and the danger, if any, of such bolt, then your verdict must be for the defendant, even though you should believe that plaintiff fell by reason of her catching her dress on such bolt.

"13. The jury are instructed, as a matter of law, that if you believe from the evidence in this case that the plaintiff's fall and injury were due to her haste in endeavoring to get off the car on which she was riding and across defendant's north-bound track ahead of the north-bound car, then the plaintiff herself was guilty of negligence, and cannot recover.

"19. The jury are instructed, as a matter of law, that if you believe from the evidence that the plaintiff got off of defendant's car at an improper place, or in an improper manner, and if you further believe that such action on the part of the plaintiff was a want of ordinary care, which contributed to the injuries complained of, then your verdict must be for the defendant."

The proposition embodied in the fifth instruction doubtless finds support in some of the earlier decisions of this court involving what was known as the doctrine of comparative negligence, but by more recent decisions that doctrine has been greatly modified, if not wholly repudiated. The rule to which the court is now committed by repeated decisions is, that a plaintiff, before he can recover on the ground of mere negligence, must show that the injury of which he complains was caused by the negligence of the defendant, and that he, himself, at the time, was in the exercise of ordinary care. Where the party injured, at the time of the injury, is in the exercise of ordinary care, no contributory negligence is legally attributable to him, although he may not have been in the exercise of the highest degree of care.

In this case, in an instruction given by the court on his own motion, it was held, in substance, that if the defendant was shown to have been guilty of negligence, and that such negligence caused the injury to the plaintiff complained of, and if it was also shown that the plaintiff was not guilty of any negligence contributing to her injury, the verdict of the jury should be for the plaintiff, and in one of the instructions given at the instance of the defendant, it was held that if the plaintiff had failed to prove that at the time of the injury she was in the exercise of ordinary care and prudence she could not recover. In these instructions the law applicable to the question of negligence of both plaintiff and defendant was laid down with substantial accuracy and with sufficient fullness. The fifth instruction was properly refused.

The eighth instruction was a mere abstract proposition, and for that reason there was no error in refusing it. Furthermore, whether the mere omission on the part of the defendant to perform a duty which it ought to perform would render the defendant liable must depend upon the consequences of such omission. If it was shown to have resulted in injury to the plaintiff the

court could not say, as a matter of law, that it, of itself, did not involve the defendant in liability to the plaintiff.

The twelfth instruction held, in effect, that if the plaintiff knew, or by the exercise of ordinary care might have discovered the bolt in question, then her catching her dress on the bolt was negligence *per se*, and must be so declared, as a matter of law. This was clearly erroneous. Negligence, in all cases of this character, is a mere question of fact, or, at most, a mixed question of law and fact, and whether the party is negligent in the particular instance must be found by the jury, and not declared by the court. Doubtless the fact, if it were a fact, that the plaintiff knew, or by the exercise of ordinary care might have discovered the bolt upon which she caught her dress, would be evidence tending to prove negligence, but it cannot be pronounced negligence as a conclusion of law.

Substantially the same criticism may be made upon the thirteenth instruction. That instruction held, that if the plaintiff's fall and injury were due to her haste in endeavoring to alight from the car on which she was riding, and to cross the defendant's north-bound track ahead of the north-bound car, then she was, as a legal conclusion, guilty of negligence. Doubtless the facts contained in the hypothesis of this instruction, if proved, constituted evidence tending to show contributory negligence, but they can not be pronounced negligence *per se*.

There is no substantial objection, so far as we can see, to the nineteenth refused instruction, and, in our opinion, it might properly have been given. But as the jury had already been instructed, at the instance of the defendant, that if the plaintiff had failed to prove, by a preponderance of the evidence, that she was exercising ordinary care and prudence, she could not recover, the defendant could not have been materially prejudiced by the refusal to give this instruction, which held that, if she was guilty of a want of ordinary care in the particular of getting off the car at an improper place, or in an improper manner, she could not recover. An instruction that if the plaintiff failed to exercise ordinary care in any respect she could not recover, manifestly included the proposition that if she was guilty of a want of ordinary care in these particulars, she could not recover. The giving of an instruction containing the latter proposition would have

added no force to the charge of the court to the jury, and would have given the jury no additional light as to the law of the case.

We are able to find no material error in the record, and the judgment of the Appellate Court will be affirmed.

THE CHICAGO & ALTON RAILROAD COMPANY v. BYRUM. (1)

Supreme Court, Illinois, October, 1894.

[Reported in 153 Ill. 131.]

PASSENGER ALIGHTING FROM MOVING TRAIN AT STATION MAY RECOVER FOR INJURY.—A passenger who, when the station was announced, got out of her seat and moved towards the car door, but was impeded by others coming in, and when she reached the platform found the train had started, but was moving so slowly that she thought she could alight in safety, and in attempting to alight was injured, the railroad company was liable.

RAILWAY COMPANY FAILING TO STOP TRAIN REASONABLE TIME.—A railway company that fails to stop its train a reasonable time to allow a passenger in the exercise of ordinary care and diligence to alight with safety, is liable for an injury to the passenger.

INSTRUCTIONS.—The modification of instructions which state as matter of law, that alighting from a moving train constitutes negligence, so as to submit the question to the jury as a question of fact, is not error.

APPEAL from the Appellate Court for the Third District; heard in that court on appeal from the Circuit Court of Logan County. The facts appear in the opinion.

BLINN & HOBLIT, for appellant, cited: *Morrison v. R'y Co.*, 56 N. Y. 307; *R.R. Co. v. O'Connor*, 119 Ill. 594; *Fernandes v. R.R. Co.*, 52 Cal. 45; 9 Am. R'y Rep. 352; *Gavett v. R.R. Co.*, 16 Gray, 501; *Gramlich v. R.R. Co.*, 9 Phil. 78; *Grietz v. R.R. Co.*, 81 Pa. St. 274; *R.R. Co. v. Feller*, 84 Id. 226; *R.R. Co. v. Toffey*, 38 N. J. 525; *Bonnell v. R.R. Co.*, 39 Id. 189; *R.R. Co. v. Righter*, 42 Id. 180; *R.R. Co. v. Pillsbury*, 123 Ill. 20; *R.R. Co. v. Fisher*, 31 Ill. App. 36; *Meir v. Penn. Co.*, 64 Pa. 225.

BEACH & HODNETT, for appellee, cited: *R.R. Co. v. Bonifield*, 104 Ill. 223; *R.R. Co. v. Haskins*, 115 Id. 300; *R.R. Co. v. Trays*, 33 Ill App. 307; *Doss v. R.R. Co.*, 59 Mo. 27; *Wyatt v.*

1. Cited in *Penn. Coal Co. v. Kelly*, 156 Ill. 9, 17.

R.R. Co., 55 Id. 485; R.R. Co. *v.* Crunk, 119 Ind. 542; Bucher *v.* R.R. Co., 98 N. Y. 128; R'y Co. *v.* Kilgore, 32 Pa. St. 292; Waller *v.* R'y Co., 83 Mo. 608; Nance *v.* R'y Co., 94 N. C. 619; R'y Co. *v.* McCurdy, 45 Ga. 288; Filer *v.* R'y Co., 49 N. Y. 47; R'y Co. *v.* Smith, 59 Tex. 406; 2 Abbot on Corp. 598; Lloyd *v.* R'y Co., 53 Mo. 509; Taber *v.* R'y Co., 71 N. Y. 489; 2 Wood on R'y Law, 1129, 1130; Thomp. on Carr. 226, 227; Beach on Contrib. Neg. 157, § 153; 2 Thomp. on Trials, § 1684; R'y Co. *v.* Connor, 15 Lea, 258; R'y Co. *v.* Stacker, 86 Tenn. 343; R'y Co. *v.* Colbourne, 69 Md. 360.

Baker, J.—Appellee brought case against appellant in the Circuit Court of Logan County, and recovered judgment upon a verdict for \$3,000. This is an appeal from the judgment of the Appellate Court for the Third District affirming that judgment.

Appellant was declared against as a common carrier of passengers for reward. The declaration alleged damages to appellee, who was a passenger on one of appellant's trains between the villages of Broadwell and Elkhart, in consequence of injury to her person, caused by the negligence of appellant, in that, upon the arrival of appellant's said train at Elkhart, and while appellee, in the exercise of due care and caution, was about to alight therefrom, appellant carelessly and negligently caused said train to suddenly and violently start and move and thereby appellee was thrown with great violence from said train to the platform; that said train was not stopped at Elkhart a sufficient length of time to allow appellee to safely alight therefrom, and while she, in the exercise of due care and caution, was about to alight from the train, appellant carelessly and negligently allowed said train to be started and moved, causing appellee to be thrown with great force and violence upon the platform; and that appellee was attempting to alight from said train as fast as she could do so after the train stopped at Elkhart, and while she was on the steps of the car attempting to alight upon the platform of the depot, the appellant, through its agents and servants, negligently caused the train to be moved, and the speed of the train was suddenly and greatly accelerated, by means whereof appellee was thrown, without any fault or negligence on her part, violently from the steps of the car upon the platform, her right arm broken, etc.

The facts in the case as found by the Appellate Court, and

which we are forbidden to review, are briefly as follows: That on the morning of October 28, 1890, appellee was a passenger on appellant's train, returning from Broadwell to her home in Elkhart, where the train arrived shortly after daylight. She occupied a seat in the rear or north end of the chair car, which was crowded. When the brakeman announced the station, and as the train slowed up, she started with her valise in hand to go down the car and out by the forward door, but was somewhat impeded by others coming in. The train stopped but a short time. Appellee got out upon the platform of the car as soon as she could, and then perceived that the train had started, but was moving so slowly that she thought she could step off without danger. When she made the attempt to alight the train had moved only about two-thirds the length of the car, or forty feet. In stepping off she was thrown down upon the platform by the motion of the car, her right arm was broken, and she was otherwise bruised, cut and injured.

Appellant's first objection, that there is a variance between the proof and the declaration, is not well taken. The objection was not interposed to the admission of the evidence on the trial. Moreover, it was not among the reasons assigned, in writing, in support of the motion for a new trial. The objection, in order to have availed appellant, should have been specifically made at the time the testimony was offered in evidence. Had it been so made, the objection could have been obviated by amendment of the declaration. *St. Clair County Benevolent Society v. Fietsam*, 97 Ill. 474; *Ottawa, Oswego and Fox River Valley Railroad Co. v. McMath*, 91 Id. 104.

Appellant contends that there was error in giving instructions numbered 4 and 6, in behalf of appellee, which were as follows:

4. "The court instructs the jury, that common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistently with the character and mode of conveyance adopted and the practicable prosecution of the business, to prevent accidents to passengers riding upon their trains or alighting therefrom."

6. "It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do, under the circumstances and in view of the character of the mode of conveyance

adopted, reasonably to guard against accidents and consequential injuries, and if they neglect so to do they are to be held strictly responsible for all consequences which flow from such neglect; that while the carrier is not an insurer for the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger, if the passenger is, at the time of the injury, exercising ordinary care for his or her safety; and this care applies alike to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties."

These instructions stated the law correctly, and were properly given. *C. B. & Q. R.R. Co. v. Mehlsack*, 131 Ill. 61; *Chic. & A. R.R. Co. v. Pillsbury*, 123 Id. 9; *Keokuk Northern Line Packet Co. v. True*, 88 Id. 608; *Gal. & Chic. Un. R.R. Co. v. Fay*, 16 Id. 558; *C. B. & Q. R.R. Co. v. George*, 19 Id. 510.

Appellant further contends that the trial court erred in modifying instructions numbered 2, 5 and 7, offered in its behalf. Said instructions, as asked, together with the modifications which were made by the court by adding the clause in each of them contained in brackets, were as follows:

2. "You are further instructed that it was the duty of the plaintiff to promptly leave the car upon the arrival of the train, and as soon as the train came to a stand at Elkhart (if it did come to a stand)."

5. "The court further instructs the jury that if they believe from the evidence that plaintiff got upon the cars of the defendant at Broadwell to be carried to Elkhart upon the line of defendant's road, and that when the train arrived at or near Elkhart the brakeman announced the station, which was heard by the plaintiff (and that the train stopped a reasonable length of time to allow passengers in the exercise of reasonable care and diligence to get off the train), and if the jury further believe from the evidence that the plaintiff, becoming bewildered, or from any other cause, she did not get off the car while it was standing at the station at Elkhart, but remained on the car until the train was again in motion, then it was the duty of the plaintiff to have

remained on the car, and not attempt to either step off or jump off while the train was in motion, although the jury may further believe from the evidence that while the train was in motion plaintiff attempted to get off, and believed at the time that she could get off the car safely; and if you further believe from the evidence that in this she was mistaken, and that in getting off the cars while so in motion the plaintiff was injured, the company could not be held responsible for such injury."

7. "If the jury believe, from the evidence, that while the plaintiff was riding upon the cars of the defendant from Broadwell to Elkhart, and that when the train arrived at Elkhart (it stopped a reasonable length of time to allow passengers exercising care and diligence to get off the train), and while the train was standing on the track plaintiff failed or was prevented from leaving the car, from any cause, until the train had started for the next station, and while the train was in motion, then it was the duty of the plaintiff to have remained on the cars, and not to attempt to get off while the train was in motion; and if the jury believe, from the evidence, that while the train was in motion plaintiff attempted to get off, and was mistaken as to the speed of the train, which she thought would allow her to get off the cars in safety; and if the jury further believe, from the evidence, that while so attempting to get off the cars plaintiff was thrown upon the platform of the station and injured, then the company cannot be held responsible for an injury so received."

It is urged that the fact being undisputed that appellee knowingly and intentionally alighted from a moving train, was such contributory negligence as would preclude a recovery, and that the court should, as it was asked to do by appellant, have told the jury, as matter of law, that such an act was contributory negligence; and that it was error to so modify the instructions offered as to make the question of contributory negligence depend upon the fact whether or not the train had stopped a reasonable length of time to allow passengers exercising reasonable care and diligence to get off the train. This position is untenable. Whether or not appellee was guilty of such contributory negligence in alighting from a moving train as would bar a recovery was a question of fact, to be determined by the jury under all the attending and surrounding circumstances. Chic. & A. R.R. Co.

v. Bonifield, 104 Ill. 223; Ill. Cent. R.R. Co. *v. Haskins*, 115 Id. 300; Chic. & East. Ill. R.R. Co. *v. O'Connor*, 119 Id. 586; Lake Shore & Mich. So. R.R. Co. *v. Brown*, 123 Id. 162. The instructions, as asked, were therefore improper. The modifications made by the court did not, to be sure, cure the defects in them, for the court assumed to tell the jury, as matter of law, what constituted negligence, instead of leaving the question of negligence to the jury for their determination. The instructions in either form, both as asked and as modified and given, were improper. Still, the modifying clause in each of them stated a correct principle of law, and appellant's cause could not have been injured thereby, for it was the duty of appellant to stop its train a reasonable length of time at Elkhart to allow appellee, in the exercise of ordinary care and diligence, to alight therefrom with safety, and if appellant failed in this duty, and by reason thereof appellee was injured while in the exercise of ordinary care and caution, appellant would be liable. *Toledo, W. & W. R'y Co. v. Baddeley*, 54 Ill. 19; Ill. Cent. R.R. Co. *v. Able*, 59 Id. 113; *McNulta v. Ensich*, 134 Id. 46. So, even as modified and given to the jury, the instructions stated the law more favorably for appellant than it was entitled to have it given, and therefore it has no cause for complaint.

We find no reversible error in the record, and the judgment of the Appellate Court will be affirmed.

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